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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE & STEEL CASTINGS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (Appendix A, *infra,* pp. 20–71) has not yet been reported.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The judgment of the district court (Appendix B, *infra,* p. 72) was entered on March 12, 1958, and the notice of appeal was filed on May 9, 1958. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17

of the Act of June 25, 1948, 62 Stat. 989. *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *DuPont de Nemours & Co.*, 351 U. S. 377.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

Appellees are the five companies (referred to herein as the defendant manufacturers) which are the sole manufacturers of the standard coupler and its parts, and the Association of American Railroads (referred to, together with its predecessors, as AAR), an unincorporated association composed of the principal railroads of the country. The standard coupler is the device adopted by AAR as standard for coupling railroad cars with one another. The complaint charged that appellees have been and are engaged in a conspiracy to restrain and monopolize trade and commerce in the standard coupler and its parts, and that the defendant manufacturers have been and are monopolizing such commerce. After trial, the district court found that these charges had not been sustained and it entered a judgment dismissing the Government's complaint. The appeal from this judgment presents the following questions:

1. Whether, on the showing that defendant manufacturers had jointly designed and developed the standard coupler, had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts, and had erected other barriers against entry into manufacture of such coupler and its parts, the district court erred in failing to find and to conclude that defendant manufacturers possessed the power and purpose to exclude competitors, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act.

2. Whether, on such showing, the district court erred in failing to find and to conclude that defendant manufacturers, the sole manufacturers of the standard coupler and its parts, possessed the power and purpose to fix and control the price of these products, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2.

3. Whether, on the showing that defendant manufacturers (1) had for many years sold the standard coupler and each of its parts at uniform prices, determined in accordance with a particular system of pricing and pursuant to successive written patent-pooling, price-fixing agreements, and (2) had, following termination of their written agreement, continued the same system of pricing, maintained absolute price uniformity, delegated price determination to one of their number, and exchanged among themselves pricing views and price information, the district court erred in failing to find and to conclude that defendant manufacturers continued their conspiracy to sell at uniform prices and to eliminate price competition in violation of Section 1 of the Sherman Act.[1]

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[1] A further question which the appeal presents and which the Government reserves the right to argue is whether the district court erred in rejecting all evidence relating to defendant manufacturers' participation in a foreign cartel, upon the ground that dissolution of the cartel had rendered moot all charges of the complaint respecting restraint of foreign commerce, when such evidence was offered to show that the Mechanical Committee (composed of one representative of each defendant manufacturer) had engaged in exclusionary activities and had not served solely as a joint medium for engineering and technical development of the standard coupler.

STATEMENT

The complaint charged a continuing conspiracy by the defendants, beginning about 1912, to restrain and monopolize interstate commerce in railroad couplers and their parts, and monopolization of such commerce by the defendant manufacturers since about the year 1920. The defendants were the five defendant manufacturers, AAR, and Foundries Export Co., Inc.[2] Coincident with the filing of the complaint in the instant case, a criminal indictment making identical charges of violation of the Sherman Act was returned against the same defendants other than AAR, plus four officers of defendant manufacturers. After all but one of the defendant manufacturers (and its officer) had pleaded nolo contendere and had been fined a total of $80,000, the district judge (the same judge who later heard the instant civil case) presided at a jury trial of the two remaining defendants. At the conclusion of the plaintiff's evidence he granted judgments of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

At the close of the trial of the instant case, the district court rendered an oral opinion setting forth the grounds for its conclusion that, on the evidence, no violation of the Sherman Act had been shown. Later, the court filed detailed findings of fact and four gen-

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[2] After the filing of the complaint, this corporation was dissolved and, with the Government's consent, it was dismissed as a defendant. The complaint alleged that with respect to foreign commerce in couplers Foundries Export Co., Inc., the defendant manufacturers, and three named foreign corporations had agreed upon an allocation of exclusive sales territories and upon sales prices in foreign countries.

eral conclusions of law and entered judgment dismissing the complaint.

The basic specific facts on which the Government relies in this appeal are not in dispute. For the most part, they are facts found by the district court, and otherwise they are established by uncontradicted evidence consisting of appellees' documents or testimony of their officials.

The case concerns alleged restraint and monopolization of commerce in railroad couplers, the coupler being the device employed to couple railroad cars with each other and with locomotives (fng. 6[3]). It concerns, in particular, restraint and monopolization of the coupler (and its parts) adopted as standard by AAR. This standard coupler is used virtually exclusively on freight cars and it is used on most passenger cars (fng. 13), for the reason, among others, that the railroads' interchange rules, adopted pursuant to their Interchange Agreement, require connecting carriers to accept in interchange only cars equipped with the standard coupler (fng. 11). We therefore first describe the adoption of the standard coupler.

From an early date, one of AAR's objectives has been to promote standards for the construction of railroad cars and their component parts, in order to facilitate exchange of cars between railroads and repair of interchanged cars (fngs. 3, 5). Notwithstanding the requirements of automatic couplers imposed by the Safety Appliance Act of 1893, 45 U. S. C. 2,

[3] We use the designation "fng." to refer to the district court's findings of fact.

there was, prior to 1916, a great diversity of couplers in actual use on railroad cars (fngs. 14–15). In consequence, the railroads had to maintain large inventories of repair parts for the many different types of couplers then in use, and frequently there was improper installation of parts, which endangered train operation and operating crews (fng. 15). Accordingly, in 1912, a special committee of AAR requested the six then existing coupler manufacturers [4] to undertake, in cooperation with AAR, development of a standard coupler (fng. 16). This proposal was carried out, and the result was the adoption by AAR in 1916 of a particular coupler as standard (fngs. 17–18).

As of October 18, 1916, in advance of AAR's adoption of a standard coupler, the coupler manufacturers, except McConway & Torley Corporation,[5] entered into an agreement which extended and supplemented an agreement among the same parties made in July 1915. The agreement, together with the annexed form of

[4] One of the six, The Gould Coupler Company, was merged in 1936 with The Symington Company, to become appellee The Symington-Gould Corporation (fng. 2). Another of the six, Monarch Steel Castings Company, went out of existence when its assets were acquired in 1920 by appellee National Malleable and Steel Castings Company (fng. 16). Our use of the term "defendant manufacturers" embraces these predecessor companies.

[5] McConway objected that the agreement provided for monopolizing trade in couplers, price fixing, patent pooling, and allocation of business, and was clearly illegal (Pl. Ex. 553–447, p. 8). The Board of Trustees nevertheless granted McConway yearly licenses to make and sell standard couplers, and in 1925 McConway became a party to the 1916 agreement made by the other coupler manufacturers (fng. 24).

patent license and price schedule, provided as follows (Pl Ex. 669–A–5): Each party shall designate one of its officers to act as a member of a Board of Trustees. Each party shall convey to the Board, with respect to all patents owned by it which are utilized in the coupler adopted by AAR as standard, exclusive rights for use of such patents in manufacturing the couplers. The Board shall license each party under all patents so conveyed and shall fix the royalty rate, which shall be "nominal". Each license so granted shall specify the licensee's proportion of the total business, which shall be his proportion of total domestic sales in the five-year period 1908–1912, inclusive. The license shall prohibit the licensee from selling at prices and terms other than those specified in the annexed schedule, and shall require the licensee to submit to the Board monthly statements showing all orders taken for couplers and prices and terms of sale.

The annexed price schedule specifies the prices to be charged for couplers and parts thereof from the date of the license to the beginning of the next quarterly period. It provides that the Board, in advance of each new quarterly period, "shall write the Licensee stating the prices which are to be in effect" during the following quarter. On sales for delivery in what came to be known as base territory,[6] the schedule

[6] The schedule defined this territory as constituting the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, Kentucky, Ohio, Indiana, Illinois and Michigan (southern peninsula only) and the cities of St. Louis and St. Charles, Missouri, and Bettendorf, Iowa.

prices (or those later fixed by the Board) were to be prices f. o. b. the manufacturer's plant, but he was to make an allowance to the purchaser of the freight at the carload rate from his plant to point of delivery. The same freight allowance was to be made on sales for delivery outside base territory. On these sales, the manufacturer's f. o. b. mill prices were to be the schedule prices (or those fixed by the Board), plus freight at the carload rate from Columbus, Ohio, to point of delivery, less 12½ cents per pound (the manufacturers' current average freight absorption on deliveries in base territory).

Under this pricing scheme, on deliveries both within and without base territory, the delivered cost to the purchaser was the same irrespective of the manufacturer from whom he bought or the location of the manufacturer's plant. This was so because each had the same f. o. b. mill price and each absorbed the freight from his plant to point of delivery. In practice, the Board fixed specific prices for couplers and coupler parts, and these were the prices quoted by all manufacturers for deliveries in base territory. However, determination of the f. o. b. mill price on sales for delivery outside this territory involved additional factors, namely, determination of the freight rate from Columbus to the point of delivery and multiplying the poundage of the coupler by 12½ cents (or such other per pound figure fixed by the Board as representing average freight absorption in base territory). If complete price uniformity was to be achieved, all manufacturers had to make the same adjustment (known as the freight differential) with

respect to any given point of delivery. Accordingly, an employee of National Malleable & Steel Castings Co. ("National") computed the applicable freight differential for hundreds of different delivery points, and all defendant manufacturers used the freight differential list computed by National's employee (Tr. 249–250, 254–255).

The 1916 agreement remained in effect, with minor modifications, until cancelled as of December 31, 1944, because of the defendant manufacturers' growing doubts as to its legality (fng. 41). During the nearly 30 years of the life of this agreement, the Board of Trustees issued licenses only to the defendant manufacturers, and it answered inquiries concerning licensing by stating that it seemed unwise to issue any new license because existing licensees had productive capacity fully equal to probable demand (fng. 74). On cancellation of the agreement, the Board of Trustees reconveyed all unexpired patents to the original grantors, and the Board then dissolved (fng. 41). Prior to the agreement to cancel, the defendant manufacturers had agreed that those who had coupler patents would grant to the others non-exclusive patent licenses covering manufacture and sale of standard couplers (Pl. Ex. 286–1009). Such licenses were in fact granted for a two-year period and have been successively renewed for like periods (fng. 43). The royalty remained nominal (fng. 46)—the combined royalty at first was the pre-1945 rate of 6 cents per coupler and later was .045%, or less than $\frac{1}{20}$ of 1%, of the price of couplers (Tr. 198–200, 1912–1913).

Following termination of the 1916 agreement, the defendant manufacturers continued precisely the same pricing system previously employed. In base territory, which was defined substantially as in the 1916 agreement,[7] the price was f. o. b. the manufacturer's plant with "freight allowed" to delivery point (fng. 53). For deliveries outside base territory, the price was f. o. b. the manufacturer's plant plus the amount of a freight differential computed on a formula designed to reflect the manufacturer's greater absorption of the freight charge from his plant to delivery point as compared with his absorption of freight on deliveries in base territory (*ibid.*).

The f. o. b. mill prices, instead of being fixed by the Board of Trustees, were those announced by National, which prices all of the other manufacturers adopted (fng. 54). Each time National changed its prices, it called some or all of the other manufacturers to advise that a new list was being issued,[8] and it announced its price changes a week or more before the respective effective dates (see, *e. g.*, Pl. Ex. 895–1658; 896–1659; 902–1665; 903–1666) thereby giving the other manufacturers the opportunity, which they embraced, to put the new prices in effect simultaneously with National. The same National employee who had compiled freight differential lists in the Board of Trustees' regime continued to compile

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[7] See National's price list effective March 1, 1948 (Pl. Ex. 901–1664, p. 10), where the territory covered is the same as in the 1916 agreement except for omission of the New England states.

[8] Tr. 202–205, 225, 231, 1218, 1220, 1245, 1621–1623, 1874–1875, 1937–1938; Pl. Ex. 208–704.

freight differential lists, and in computing each list he used as the freight absorption factor a figure given him by an officer of National—a figure necessarily unknown to the other manufacturers (Tr. 249–250, 252–254). These freight differential lists, which the other manufacturers obtained from National (fng. 56), gave the dollar amount which, when added to the mill price, yielded the exact price to be quoted on sales for deliveries at hundreds of different points.[9]

The principal officers of defendant manufacturers, at various meetings which they attended, discussed factors which would affect coupler prices,[10] and on several occasions urged National to increase its prices.[11] National did considerable prior missionary work with customers and competitors prior to shifting, late in 1947, from quotation of firm prices to "prices in effect at time of delivery" (fngs. 62–63). All the other defendant manufacturers adopted this new basis for quoting prices (fng. 64).

The district court found that each other defendant manufacturer, in deciding to follow National's prices, took "unilateral, internal and independent action" (fng. 54); that National never informed the others of what its new prices would be until it had decided this matter for itself (fng. 55); and that the 1947 change in the basis of quoting prices was not the

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[9] National's freight differential list dated February 24, 1947 set forth the freight differentials for 49 points in Texas alone (Pl. Ex. 841–1604, pp. 15–16).

[10] Tr. 228–230, 341–352, 390–391, 446–450, 1243–1245, 1874, 1950.

[11] Tr. 1069, 1243–1245, 1874–1875, 1937–1938; Pl. Ex. 208–704.

result of any understanding, agreement or conspiracy (fng. 64).

The most important feature which distinguishes the standard coupler from the non-standard is that each of its six basic parts can be interchanged with the same part of any other standard coupler regardless of which manufacturer produces the part or the coupler (Tr. 2073, fng. 6, Tr. 609). To achieve this interchangeability, a manufacturer must know the exact dimensions required for each part (Tr. 1320, 2002). Furthermore, he must make the parts within unusually close tolerances, some as close as 1/32 of an inch (fng. 71). National's assistant chief engineer testified (Tr. 2002) that, in order to do this, the manufacturer "must use manufacturing gauges that conform to the standard test gauge[s]."

Access to these standard test (master) gauges and to the required dimensions is within the exclusive control of the defendant manufacturers. Each of them, through its engineering representative, is represented on a body known as the Mechanical Committee of the Standard Coupler Manufacturers (fng. 29). This committee designed and developed the identical (master) gauges (fng. 35), which "were manufactured all at once at the Coupler Pattern Department of National" (Tr. 2004). There is one set of master gauges in each manufacturer's plant (*ibid.*).

The Mechanical Committee also developed drawings (Tr. 594–7) which contain only the dimensions of the standard coupler and the tolerances (Tr. 600, *e. g.*, Pl. Ex. 124–1470) although they are called construction drawings (fng. 36). When they are furnished to

the AAR they are marked "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" (*ibid.*).[12] According to the vice-president in charge of engineering of American Steel Foundries (American), the necessary dimensions cannot be ascertained without the construction drawings (Tr. 1320).[13] They cannot be obtained by taking a standard coupler apart (*ibid.*).

The applicable patents on the standard coupler (at least 45 in number) are owned by two of the defendant manufacturers (National and American) (Tr. 1721–6).[14] All of the defendant manufacturers have licenses under all of these patents (*ibid.*). No license to manufacture a standard coupler has ever been issued to anyone other than a defendant manufacturer (fng. 74; Tr. 1954–5, 1335). Although National's vice-president in charge of issuing patent licenses testified that there was no agreement which prevented him from issuing licenses to any qualified applicant (Tr. 1923), and that it was his company's policy to give "serious consideration" to any license application from any qualified applicant (Tr. 1224), neither he nor any other witness testified that any defendant would license every qualified applicant.

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[12] "Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives" (fng. 36).

[13] The chairman of the Mechanical Committee also so testified (Tr. 599).

[14] Two of the other defendant manufacturers hold patents on one of the items used in conjunction with the standard coupler, the yoke (Tr. 1721–6).

For standard products other than couplers, AAR attempts to insure that an unpatented article is permitted as an "alternate standard" whenever the "standard" article is patented (Tr. 2242–3). However, when a railroad member of AAR attempted in 1949 to induce it to withhold approval of any more patented improvements to the standard coupler unless the patent owner agreed to license any applicant (Pl. Ex. 106–1372, 107–1374), the proposal was rejected (Pl. Ex. 382–1386, 961–1388, p. 5, items 20 and 21) following circulation among AAR officials of an opposing memorandum supplied by American (Pl. Ex. 43–507, 44–508, 45–509).

THE QUESTIONS ARE SUBSTANTIAL

Prior to 1945 the defendants were unquestionably violating both Section 1 and Section 2 of the Sherman Act. They were parties to an agreement expressly providing for price fixing, allocation of business, and exclusion of others (by virtue of the historical quota provision), pursuant to licensing of pooled patents. The agreement went beyond any immunity from the antitrust laws given by patent rights, and, apart from such immunity, was in clear violation of the Sherman Act.

While *United States* v. *General Electric Co.*, 272 U. S. 476, holds that in some circumstances a patentee is within his patent rights in fixing the price charged for the patented device by licensees of his patent, it is settled that when separate owners of separate patents, by cross licenses or other like arrangements, fix the price to be charged by themselves and by their li-

censees, this merging of the benefits of price fixing under patents is beyond any privilege given by patent statute and runs afoul of the prohibitions of the Sherman Act. *United States* v. *Line Material Co.*, 333 U. S. 287, 312–315; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 400–401; *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 84–85.

Here, there was not only price fixing and other restraints of trade through the medium of licensing under pooled patents, as condemned in the cases cited above, but, in addition, as in *Gypsum*, defendants' combination brought an entire industry under price control—"all former competitors in an entire industry had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices." 333 U. S. at 401; 340 U. S. at 84. Accordingly, the district court plainly erred in its finding of fact [*sic*] that the 1916 agreement "did not unreasonably restrain or monopolize trade or commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights" (fng. 25).

The basic question presented by the appeal, therefore, is whether the defendants abandoned their monopolization, conspiracy to monopolize, and conspiracy to eliminate price competition and to sell at uniform prices when they formally abrogated the 1916 agreement.

1. We submit that facts which stand admitted establish that the defendant manufacturers have, since 1945 as before, illegally monopolized trade and commerce in standard couplers and coupler parts.

"Monopoly power is the power to control prices or exclude competition." *United States* v. *DuPont & Co.*, 351 U. S. 377, 391. "[C]ontrol of price or competition established the existence of monopoly power under § 2." *Id.* at 393. In determining whether there is illegal monopolization, the crucial question is whether "power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811. While a monopolist must have "both the power to monopolize, and the intent to monopolize," "specific intent" to monopolize need not be shown, "for no monopolist monopolizes unconscious of what he is doing." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C. A. 2), quoted with approval in *American Tobacco* at p. 814.

Power to exclude others is the necessary effect of defendants' control over, and exclusive retention of, the engineering drawings and related data needed in order to make a standard coupler which meets the required specifications. The fact that no newcomer has entered the industry during a 40-year period tends to confirm existence of power to exclude. And *American Tobacco* directly held that if this power exists, it is immaterial that it has not actually been exercised, *i. e.*, that there has been no overt act of exclusion.

The appeal, therefore, presents the substantial question whether illegal monopolization continues to exist where, despite termination of a formal agreement upon which such monopolization originally rested, the same power over the market continues.

2. We submit that on the admitted facts the defendant manufacturers were engaged in an illegal price-fixing combination. The others have consistently adopted National's prices and related freight differentials. The significance of this action is highlighted by the multitude of individual prices and freight differentials which the others adopted when National changed its price [15] or issued a new freight differential list. Thus, for example, National's price list for couplers and coupler parts, effective March 1, 1948, contains over 200 separate prices, a number of which are less than $1.00 (Pl. Ex. 901–1664), and its freight differential list of February 24, 1947, contains some 2,000 freight differentials (Pl. Ex. 841–1604). What we have, therefore, is participation by the defendant manufacturers in a course of action, common to each of them, the necessary result of which was elimination of all price competition. We submit that under settled principles this constituted illegal price fixing, with the function of price determination tacitly delegated to one of their number. In these circumstances it is no defense that, within the limits of uniform prices, the defendant manufacturers may have actively competed with each other for business.

In *United States* v. *Masonite Corp.*, 316 U. S. 265, 274–276, this Court held that the facts established a price-fixing combination notwithstanding the district court's finding that the defendants had not acted in concert. The Court said that the fact that one com-

[15] National made approximately 13 price changes subsequent to April 8, 1946, the date on which OPA price control terminated (fng. 60).

pany alone fixed the prices, and that the others never consulted with it concerning them, did not make the combination any the less illegal. It said (p. 276): "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action." To the same effect, see *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394.

In this aspect, the appeal presents the important and substantial problem of distinguishing between principles which the Court applied in *Masonite* and in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, and principles found to be controlling in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537. This delineation should serve as a guide in administration and enforcement of the Sherman Act in many situations, particularly those involving a product which must conform to prescribed standards.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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JULY 1958.

APPENDIX A

District Court's Opinion

Connell, J.: May it please my brother lawyers: we must first say that we all regret the illness and absence of Mr. Luther Day throughout that part of the trial which ensued after he had to leave us. With due regard to all other great lawyers our State has produced, especially in this area, he is considered, I believe, by our leading lawyers as possibly the greatest trial lawyer in Ohio's history, and it is a matter of great and sincere regret to all of us, I'm sure, that his participation in this trial had to end because of an illness. We hope he is soon back at the trial work he so loves.

Today you will have to be patient with me, for I work throughout from longhand notes, and I do that for your convenience today because quite a few of you have expressed a desire to complete our matter as reasonably early as is possible before the great holiday which approaches. I must say our case terminates today with regret. It will not seem right for those of us who work here every day to get back to just two trial tables and to put the witness back in the right chair, and to operate in your absence, for we have been together for a long time.

I join all other eminent counsel in thanking the reporters who have done a perfect job throughout, and Mr. Rogers, and Messrs. Mancini and Wetherbee, who have helped you get everything you wanted, and Mr. Stevens who kept perfect track of our 2,000 odd exhibits these many weeks. Mr. Stevens' exhibit record was a great convenience to all of us throughout the trial of the case, putting us in a position where we

could instantly recognize, on the part of 30 or 40 men in the room, just exactly which exhibit a lawyer was speaking of.

You have all mentioned the fact that all here sought to make you feel at home. This we did, insofar as I was concerned, because as a lawyer we know from experience what it is to go a long way from home to espouse a cause which may be on the unpopular side, and sometimes against local legal heroes.

As lawyers, we all know and understand exactly what it feels like to walk into a strange court room with a frosty atmosphere, just as surrounded the Prophet Daniel in the Den of Lions, and as lawyers we have all had Daniel's experience that in order to win we had to work from a dietary viewpoint in which cross-examination was our only weapon, and we had to concoct such a dish as would cause our opposition to split asunder.

Every comfort we gave you we owed you. We wanted you to be so comfortable that nothing would interfere with your capacity to fight.

This has indeed been a difficult, lengthy and onerous case. It has kept you professional men quite busy for some years. After you had worked out a timetable between you, you did a splendid job of boiling the case down to its main issues: on agreeing to everything susceptible of agreement; you worked it down to a point where most of the factual situation was not in dispute, except that the Court must decide the motivations behind much of the factual situation, and the intent with which certain acts were and are being done.

You have taken a case which was early anticipated by all to require a year for trial and you have agreed to so much between you that actual trial work will have been less than two months. You have done

such a perfect job of streamlining your case; you have cooperated with the Court and assisted the Court to the fullest possible degree, for which we are grateful indeed. In fact, you cooperated so well that for a short time, at the beginning, the Court did not fully understand the degree to which you had cut down on the work both you and the Court would have to do.

This case was some years in coming to trial. It has been a solid year in immediate preparation by you. You men worked continuously for months on depositions, pleadings, admissions, and other evidentiary agreements between yourselves. All of you supplied me with splendid advance briefs, citing your authorities, and thus gave me ample early time to check them out, for which I am grateful. In fact, I personally feel if those pages that you gentlemen supplied me with were put in one book it would make as fine a textbook on this subject as has ever been written.

On trial you have produced many witnesses and numerous exhibits. We have had approximately 1200 exhibits of plaintiff, some of which are but a page and some of which are leaflets, and records, and some of which are almost books. The defendants have produced approximately 650 exhibits and many witnesses, some of whom had previously been plaintiff's witnesses.

I have had opportunity of looking at these exhibits both during our many weeks of trial and during the intervening days between hearings. I must say that yours has been the best documented lawsuit I have ever seen.

At the outset of trial, we seemed to get a slow start. At first I misunderstood plaintiff's counsel's method of introducing his exhibits. It is the rule

that exhibits should be inquired of and qualified before being offered, but here counsel seemed to be offering them before qualifying them. I didn't at first quite appreciate how much of my work you men had arranged to do for me in advance.

Later counsel for plaintiff was being so meticulously careful as he initiated his inquiries that our case seemed to be going too slowly. Then defense counsel indicated they did not desire to be too technical; and after we got past those first roadblocks at times plaintiff's counsel moved so rapidly that it was difficult for the defense to keep up with him.

May I at this point thank all counsel for their courtesy, their efficiency, their hard work, their patience, and I am grateful too for the brotherly and kindly spirit in which you men all fought with each other so hard, so fairly, and so zealously, as you presented your respective contentions. I have never been in a lawsuit where men lived together with each other in the court room so long and fought so valiantly and kept their amiability so well. You have all had a difficult case here. It represents four and a half years of hard work by all, and it includes many months of immediate and intensive preparation.

It is too bad that after such mutual and joint efforts on the part of such splendid trial men anybody must be on the losing side. But such is the ultimate in the life of every lawyer now and then.

Now for the case. Ours is fundamentally an injunction question. Your pleadings boiled down to your opening statements. I will now cover those.

It is here claimed by the plaintiff that these defendants are in active violation of law; that they currently combine to accomplish an unlawful purpose; that they restrain trade by fixing prices, by dividing business, by holding down the less powerful members within

their group, and by permitting no others to join their group.

It is further claimed that such conspiracy has existed for over four decades. That prices were set in an agreement going back to 1916. That the exchange of cost information between cost accountants employed by defendants was part of the combination. That their engineers met as a Mechanical Committee to make certain improper decisions also considered unlawful.

It is further claimed by plaintiff that defendants operated this combination through the instrumentality of a Board of Trustees from 1916 to 1945, which it then dissolved because, plaintiff claims, defendants knew it to have been unlawful.

The plaintiff further claims that defendant The Association of American Railroads was a part of this unlawful combination. That they took no safeguards to prevent these alleged illegal acts and results of other defendants.

In opening statement, plaintiff said it would offer some 50 witnesses and 1200 exhibits to prove its case; that the combination to fix prices continues to date; that the business is allocated to date; and that patents are maintained to exclude others to date; that, in effect, the aid of this Court should be invoked to enjoin this current illegal combination. Counsel for plaintiff said it would have a circumstantial case as to these defendants, and that it would not prove its case by direct evidence.

In its opening statement, it is here claimed by defendant National, meaning National Malleable & Steel Castings Company, that no such condition now exists which could be properly susceptible of injunction. They rely particularly on the authority of the case

of United States v. The Oregon Medical Society reported in 343 U. S. 326, in the year 1952.

Defendant National says it is violating no law; that it does have patents, and properly so; and that it has joined with others to give the country the most safe and efficient coupler; that it did operate under an agreement, and did use a Board of Trustees between 1916 and 1944 when, by reason of what appeared to be possible changing thought on the subject of its legality, the Board dissolved itself.

National says the 1916 agreement was lawful throughout its entire existence; that the best available counsel, including a former United States Attorney General, so instructed them.

Counsel for National denies they were in a patent pool. Counsel says the Justice Department investigated this entire matter in 1932 and found nothing illegal about it at that time.

Counsel says each defendant got all the work it could; that customers were not divided; that there was no price-fixing.

Counsel says that between November 15, 1944, and April 6, 1946, the OPA was in effect, and that between January 26, 1950 and February 12, 1953, the OPS was in effect, which brought Governmental control of the situation down to a time just three months before the within case was filed.

Counsel says National made the decision to determine its own prices on couplers; that others would adopt similar prices. Counsel says such prices were based on its own business judgment, and never were based on any agreement with anybody else; that uniform prices are due to economic and business reasons, and are not the result of any illegal agreement.

In his opening statement, counsel for American Steel Foundries suggested that the plaintiff had the

burden of establishing a present threat to violate the law today. Counsel further said that as to the uniformity of prices others follow the prices set by National on couplers, as they follow the prices by National on freight differentials.

Counsel said allocations of business were made before 1945, but never since, and that today each defendant goes after all the business he can get.

Without too much repetition, may I say that counsel for Buckeye stated that they sell all they can, as did counsel for Symington-Gould.

Counsel for McConway & Torley said the same, and added that patentors should be encouraged so that the public gets the greatest amount of benefit from their work. Counsel also related that in 1893 the law required automatic couplers; that the results achieved by the manufacturers in order to comply with the Government's suggestion resulted in the saving of lives and property, and in the expedition of passenger and freight travel; that such result was possible only by team-work and cooperation on the part of all concerned, for the benefit of the entire nation.

Counsel for the Association of American Railroads stated that his clients are purchasers and users of the products involved. He stated his clients are really being accused here of raising prices on parts which they would have to pay. He stated that the standard coupler was the result of the cooperation of all, and stated that the AAR was no part of the 1916 agreement, nor did it know of its 1945 dissolution until three years after it happened.

The plaintiff has here presented its circumstantial case against defendants on the question of fixing prices, dividing business and controlling who can get into this business, and defendants have here presented their defense consisting of their refutation and ex-

planation of the circumstances claimed by plaintiff, and by eliciting the direct and positive testimony of all witnesses so concerned to the effect that there was never any combination amongst them to do anything unlawful.

We shall, of course, make no effort to review the testimony. We have listened to many witnesses on both sides. They were generally the executives and representatives of the defendant companies. They were all accomplished and honorable professional men. Many of them were self-made. Many started at the bottom. They all seemed to me to be honest, hard-working engineers and executives.

The original accomplishment of these defendant companies was unquestionably a boon to this country. To follow the Government's suggestion, they got together with all the genius they could muster, and produced the standard coupler. They made the American Railway the world's best, and they made American products the best in their field.

Their information had to be channeled through some kind of a clearing-house. They had to use such a means to assemble and perfect their finished product, as otherwise it could never have been, in all probability, produced. Their method of conducing to the country's safety met with universal success. Their lawyers assured them their method was legal, and one of these opinions came from a former Attorney General of these United States. They say that the Government checked them out and found no complaint.

But times change, and from their viewpoint it seems that, as they regarded it, legal thinking changed; and fear of such change caused them in 1944 to discontinue operating under the 1916 agreement.

After such discontinuance they, nevertheless, all continued thereafter, and up to date, to manufacture their products. Each continued to use all of the facilities for manufacture which it already had; each continued to utilize the full manufacturing capacity which it already had; each continued to do so up to this very date.

Meanwhile, Government price-fixing intervened during most of the time which has since elapsed, and was discontinued just three months before this and the criminal case, which has been here mentioned, were filed.

I think it is fair for me to say that I am one of the few people in this court room who ante-date the history of this lawsuit. I do believe that the standard coupler was a boon to our civilization. For one thing, although it is no part of this record, I can remember when our city, which was then something of a railroad city, I can remember when all the trains were on the ground and none elevated. We had a lot of men around who had lost arms and legs by the old couplers. Such amputees were noticeable when I was young. Everybody knew a few men who had been crippled in that way.

All of you Cleveland lawyers in the room will remember a splendid municipal judge who died not so long ago, David Moylan, who lost both of his arms to couplers. While it is no part of this record, it is worthy of mention, the way he overcame his handicaps as a student, as a lawyer, and as a judge, made the local lawyers ever conscious, not only of what couplers could do to a man but equally conscious of what men could do to overcome what couplers had done to men.

I can remember when there were a lot of coupler lawsuits both in this United States Court and in our

local Common Pleas Court. But in my sixteen years on the bench I have never seen one. That type of human misery seems to have quite come to its end. And while ours is the profession which theorizes on how to end human misery, it is fair to say that there can be no question here but that the engineering genius we have herein observed in this very court room is accountable for this particular improvement.

At the outset here, as we have said, plaintiff's counsel informed us that theirs was a circumstantial case. Plaintiff has here undertaken to forge a chain of circumstances against these defendants, and there here appeared to be certain circumstances in plaintiff's favor, which I will list as follows, much as they have listed them:

First, the fact that for nearly 30 years defendants operated under a Trust Agreement fixing prices and allocating business;

Secondly, the fact that prices are quite uniform today;

Thirdly, the fact that a Mechanical Committee, as has been utilized in the past, is still utilized today;

Fourth, the fact that these defendants reveal costs to each other today and visit each other's plants today;

The fact that no new capital in some 30 to 40 years has ventured into the business;

The alleged improper retention of control over their patents.

Now, may I observe at this point, to digress a moment, please, that when Mr. Victor DeMarco started in with his argument he made reference to the cases he had to try in the prosecutor's office and said that cases often became much simpler than they at first blush appeared. That may well be. I once heard one of the partners of the partnership of which he and

Mr. Kerr and Mr. Williams are members here, I once heard one of their partners, Mr. Patrick Mulligan, one of our greatest trial lawyers, say that a murder case was really an assault and battery case in which the victim died.

The within case is really a case in conspiracy, if there be a case, and a conspiracy whether to rob a bank in fifty seconds or to violate the Sherman Act over a continuous period of 50 years, such conspiracies are provable in exactly the same way. So that even this case may be simpler than appeared at first blush, as has been said.

This is, as we have said, an injunction case, and the law of injunction applies. So we are here concerned with that alleged conduct now going on, improperly, the continuance of which improper conduct ought to be prevented and stopped by injunction, according to the plaintiff's theory of the case. So there must here be that improper conduct which is susceptible of injunction for the plaintiff to prevail, and the thing enjoined must be happening as of the present moment, or likely to happen in the immediate future.

Plaintiff claims there is going on at this moment, and likely to go on in the immediate future, a course of conduct on the part of all defendants which is most improper; that such defendants are in an illegal conspiracy and combination to restrain trade in interstate commerce in violation of law, and that such illegal combination has been actively violating federal laws for four or five decades.

The plaintiff's claim herein is a most serious accusation. If it is true, then the department of the Government which examined into the question on several occasions should have brought this action long ago. If it is true, it is regrettable indeed that the Govern-

ment for some years under OPA and some years under OPS, consciously or unconsciously, conduced to the evil when it exercised full control over the situation. If it is true, this action and the remedy sought is long overdue.

Now, just what is before us to prove that it is true? Well, counsel told us at the outset of the case that he was going to present here what he called a circumstantial case; that he was going to prove this active present conspiracy by a chain of circumstances. And the presentation plaintiff has made has been entirely one of circumstance alone, for no witness they have produced here has said there was ever any illegal combination. In fact, every witness who was asked—and they were all plaintiff's witnesses, and then many of them thereafter became defense witnesses—but every witness who was asked testified directly and positively to the contrary. The only one who says there is any illegal combination is plaintiff's counsel himself, and he bases his statement solely and only on the circumstances he has offered.

There have been in the case on the side of both plaintiff and defendants many circumstances which may have a tendency both to prove and to disprove plaintiff's claim. And our ultimate findings must necessarily here be based on such circumstantial evidence both ways, and on the direct and positive evidence of the witnesses who have testified before us.

Our findings of fact and conclusions of law we will herein give you verbally, leaving to counsel the task of later translating the same into appropriate written form.

Since this is an injunction case, we might well have limited the evidence to that which has happened since December of 1944, because a 13-year period ought to have been sufficient to prove a current conspiracy, if

one exists, but we have permitted the plaintiff to go back beyond the Trust Agreement of 1916 which was dissolved in December, 1944, and into some events of decades previous to that, for the purposes of showing plaintiff's claims as to the motivations, alleged illegalities, the intentions with which certain wrongs were done, habit patterns, etc., all with a view to throwing light on the current situation which plaintiff claims is here susceptible of injunction and concerning which plaintiff claims that the people of these United States cannot be otherwise protected from this 40- to 60-year-old illegal combination.

Now we come to the first circumstance having to do with the 1916 Trust Agreement. There is no question but that the operation of this industry was conducted completely under a Trust Agreement from 1916 to 1945. It seems to have been a necessary concomitant to the production of the device which America so needed at that time. Men gave up rights for the common good; they joined together and fought a little war to save arms, legs, lives, and freight and time. They had to invent instrumentalities for that purpose, as men first invented legal entities for other purposes. They had to create a clearing-house of genius and ideas and patents and parts.

They were successful beyond expectation. And at the time the country and the world acclaimed their end result.

As to the Trust Agreement of 1916, as of the date it was made I see no illegality in it then, and since 1945 no court has ever found it to be illegal. Nor do I. Nor do I believe in the correctness of plaintiff's theory that it ended only in its outward manifestations, because the provable outward manifestations, which seem to be quite immune from plaintiff's attack, namely, the graphs which are here in the form

of exhibits in evidence, and from which I will later quote—these graphs prove without any refutation whatsoever that from 1945 to date there has been a veritable, if I may use a colloquial expression, a veritable "cat and dog fight" between these defendants to get all the business away from each other that they can.

What these manufacturers did before 1916 was unique in the history of patents and inventions. For the benefit of the entire country they so gave up their exclusive rights for the use of each other as to make it possible for the development of their ultimate mechanical masterpiece.

If they didn't have this team-work for the benefit of our people, they might still be fighting over patent differences, and we might never have perfected a standard interchangeable coupler.

I can see no legal wrong in their method of mutual sacrifice of patent rights to attain this end. I find their intentions to have been perfectly lawful. I think the contention that their intentions were then improper is an unreasonable contention.

I agree with Jim Davis that to prevail the Government must here prove some cognizable danger of recurrent violation on the part of the defendants, which he quoted from a United States Supreme Court citation.

Now, here the plaintiff has said the defendants can present a legal justification for every act they have done singly—or that was the way I understood Mr. Bernstein to have said, and that's the way the defense understood him to have said, and then he added that considered together they become illegal. Perhaps I should withdraw that because of what Mr. Bernstein later said.

The plaintiff claims they prove a conspiracy between 1916 and 1945 here. Mr. Davis says, and I

agree with him, that if they have so proved a conspiracy between 1916 and 1945, they have equally proved, on the part of the plaintiff, that it was completely terminated in 1945.

The plaintiff claims other practices here ensued which constituted a continuance of the conspiracy they claimed. They claim that the agreement ended only in its outward manifestations. The evidence before us contravenes the claim. On the one side we have that accusation. On the other side we have the compilations which were translated into graphs which showed exactly what happened in this business after 1945. Some of this evidence came from the plaintiff.

The evidence introduced by the plaintiff proves that American, a big company, whose quota in 1944 was 20.54 percent has averaged 18 percent from 1945 through 1956. They went down 2 percent from their old quota, while Buckeye, a little company with a quota of 13.41 percent averaged 15 percent. They went up the equivalent of the loss of the big company. Symington-Gould, with a quota of 11.68 percent, averaged 14 percent—up 3 points. And this percentage is a percentage with reference to the entire business of all the coupler manufacturers in the United States. So that when Symington-Gould, for instance, goes up 3 percent of all the business in the United States, its own business may be increased 10 or 12 percent.

McConway & Torley had a quota of 10 percent in the old days and averaged 13 percent ever since. National Malleable's quota which had been 44.37 percent has averaged 40 percent ever since. So that loss of 5 percent of the total business of all coupler manufacturers, that 5 percent of all the business, might very well be 10 or 12 or 15 or 20 percent of their own business. These are percentages of a total of 100

percent of all business of all companies. As to each individual company each of these percents would average a higher percent of that company's total business. National's annual fluctuations run from 37 percent to 42 percent. But this 5 percent fluctuation of all business would be one-seventh to one-eighth of their own total, which would be 14 percent to 12½ percent.

Thus McConway & Torley, which was once on a 10 percent quota up to 1945, ran in the following years immediately thereafter, 16 percent, 12.51, 13.78, 13.89, 15.94, and so on. And this percentage of all business would rate a far higher percent of its own individual business.

Symington-Gould's quota of 11.68 has since gone to 18.23 percent, and has averaged 14.5 percent over the period of the last 12 years.

It is the claim of the plaintiff that the little companies were being bullied here, the big companies told them what to do. But, strangely, from the figures which have been compiled—there is no dispute on it, there is no claim they aren't true, not a question was asked about them, and plaintiff ignores the subject completely throughout two full days of argument—but, nevertheless, the little companies which are theoretically bullied here under the plaintiff's contention have had all the increase in business at the expense of the larger companies which, under plaintiff's theory of the case, have been doing the bullying.

None of this information is questioned. None of this evidence is rebutted. There is no question about its mathematical certainty whatsoever, and these figures, and other figures which I will later on mention, completely disprove the premise on which plaintiff bases all its claims as to quota-allocation.

For instance, on bodies Buckeye's 1944 quota was 13.41 percent, and in 1957 it became 42.5 percent. On knuckles Buckeye's quota was 13.41 percent, and in 1952 it became 42.5 percent. They multiplied their business three times over.

As I find with reference to quotas, so it may be said, from one end to the other in this case, that one must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened. When the issues can be so squarely met by proof to mathematical certainties, our task becomes less difficult than as it first appeared.

Now we come to the second circumstance, uniform prices, and we will go to the other graphs which prove what a lively battle has been going on here since 1945. The glaring circumstances from end to end of the case seems to be the claim that prices are uniform, and business is allocated, and the combination is so satisfied that there is a complete lack of any healthy competition among these conspirators.

The real complaint of plaintiff's counsel is that they are doing so well as the result of their conspiracy that they don't have to fight with each other. The theory is that business has been so good for 40 years, due to their successful violation of the law, that the spirit of competition between them, so necessary to the country's well-being, is dead.

What do we find in the evidence? Let's at first ignore animate witnesses, for all animate witnesses testified positively and directly to the opposite of plaintiff's claim here. There is no question where the animate witnesses stand—and all were plaintiff's witnesses, and many were defendant's witnesses.

Let us look to a few inanimate witnesses which completely disprove plaintiff's claims in this respect—

witnesses which have in no wise been refuted—witnesses which have been meticulously ignored and avoided by plaintiff in all argument.

I refer particularly to ASF Exhibit 66–165–A, and National Malleable's Exhibit 301, and Buckeye's Exhibits 383 and 384. These exhibits prove what happened to all this business from 1945 to the present date.

This exhibit, ASF Exhibit 66 165–A, is worthy of comment. It covers 100 percent, or the total business of all involved. It shows that on the Type E couplers between 1954 and 1957 National's business is down 5 percent—not just 5 percent or one-twentieth of National's own business, but 5 percent of the total business done by all. In business that is a terrific cut.

I cannot believe that this is the result of any agreement between them, because no one would ever agree to lose that much.

At the same time ASF went up 4 percent. So they got 80 percent of National's loss. Now, ASF might like that, but National wouldn't like it.

Buckeye picks up 6 percent between 1954 and 1955; McConway & Torley went down 6 percent from 1956 to June of 1957. It looks like Buckeye got what McConway & Torley lost.

It seems to me results like these, and compilations like these, and mathematical certainties like these, talk louder than the accusations.

Again, in 1948 National had 42½ percent of all business in E couplers, new equipment, repair and maintenance sales, and in June, 1957, they were down to 35 percent of all business. This is a terrific drop because that 7½ percent loss of the total of all business done by all constitutes a reduction in National's own business of a little more than a 19 percent loss of National's own business. And Symington-Gould

and American Steel Foundries gained nearly all of National's loss.

I cannot believe these losses and deficiencies are the result of any deliberate scheming, conspiracy and combination of the manufacturers, to violate the law, but I believe this is the result of natural competition, and not the result of unnatural or unlawful combination.

At the same time Buckeye's gain was approximately equal to McConway & Torley's loss. This does not look to me, gentlemen, as if the lions and lambs lay down together. It has more the appearance of what is colloquially called a cat and dog fight, for business and survival.

Every defendant is out to get all the business he can get. They have all so sworn, and the mathematical certainties prove it. And the way their businesses have gone up and down—and there is only 100 percent to fight about—the so-called largest operator loses close to 20 percent on a gradual 9-year decline. I think human nature is such that no such loss would ever be suffered by it as a result of an unlawful combination. They lost 20 percent because they had more competition than they or anybody else ever bargained for.

This doesn't sound like a situation to me in which a group of men got together and agreed not to fight. It looks to me as if the only way in which it could be fairly said that they sought to allocate work was by giving everybody the same chance to fight for it. So much for the fight on the Type E couplers.

Another graph, National Malleable's Exhibit 301, showed National's participation in the sale of all railroad specialties, which includes couplers and everything else it sells. In 1936 National had 12 percent of all such business. In 1939 it moves up to 19½

percent. In 1941 it went down to 14 percent. Nine years later it was 15 percent. And in 1956 it got back to 20 percent, approximately where it had been 20 years before, in 1936.

Such fluctuations in these percentages, which refer to the total of all the country's business, indicate, as I see it, such variations as constitute a refuting circumstance to the claim that there is here an unlawful combination by which National or any other defendant here seeks, gets or controls such particular quantity of business as is unfair or unjust to the people of these United States.

The fact is that the country gets that benefit which inures as the result of the increasing effort of these defendants to get all the business they can away from each other.

Note, gentlemen, these figures and percentages appearing on these graphs were not attacked or rebutted in any manner whatsoever by plaintiff. I take it they are correct and true in every detail.

Buckeye's Exhibits 383 and 384 give us information on changes in the number of customers to whom they sell. The customers necessarily must be railroads. They have no other customers.

Now, the AAR has 110 Class 1 members, meaning Class 1 railroads, meaning railroads with a gross of over $3,000,000 a year, and 160 associate railroads which are not in Class 1. So the number of prospective customers involved here is always limited to a possible 270.

Buckeye's graph, in Exhibit 283, indicates that between 1940 and 1957 Buckeye had 110 specific customers, and that in the 1940–1944 period, under the Board of Trustees operation, they had 37 other customers whom it later lost. Those customers ceased to buy from Buckeye after 1944.

On the other hand, after the Board of Trustees dissolved, and between 1945 and 1957, Buckeye picked up 138 customers which it never had before. Considering how few prospects there are, this looks like natural competition to me. There were 270 possible customers and Buckeye picked up 138 new ones—over half of all possible prospects. I find that to be very spirited competition.

Buckeye's Exhibit 383 shows that after the 1944 dissolution Buckeye went out and gained 138 new customers and, at the same time, lost 37 of their old customers. Therefore they have a net gain of 101 customers when there were only 270 possible customers to solicit. In other words, they got more than one-third of all customers from all sources, which were also sources for the other defendants. This proves the fallacy of the claim that there is no competition here.

It did not have a proportionate increase in business, but this does prove it is highly competitive, that there is turmoil and change, that nobody lays down on the job, and there is a very sincere fight to get everybody else's customers.

Buckeye's Exhibit 384 shows, by graph, the years in which these new customers for couplers and parts were acquired between 1945 and 1957. In 1945 they picked up eleven; in 1946 they picked up eighteen; 1947 they picked up seventeen; in 1948, seventeen; in 1949, nine; in 1950, seven; in 1951, ten; in 1952, eight; in 1953, six; in 1954, eight; in 1955, eleven; in 1956, eight; and in 1957 so far, eight, for a total of 138 all out of the same 270, or more than half.

Again considering how few the prospects are this indicates that Buckeye is no more satisfied with the status quo than are its competitors. Each fights for every customer and every sale. This circumstance, so

proved by these graphs, is another proof that the industry is one of ceaseless competition and not one of planned limitation.

O'Kane of Buckeye said that since 1945 they went after all the customers they could get and their coupler customers almost doubled.

To increase one's business in this industry does not mean one creates business which did not exist before. It means you must take it away from somebody else. There is only 100 percent of the business and it is limited to railroads only, and no salesman creates any new prospects. Sales ability constructs no new railroads. You have to fight for what there is. They all have to fight to get all they can from the other fellow and to hang on to what they have, and the fluctuations of sales and production in all these defendant companies proves that they are competing to the best of their capacity and illegally agreeing not at all.

Buckeye's counsel says they followed National prices; that they are constrained to do so because couplers are exactly alike and completely interchangeable and fungible. All must go to the same small group of customers represented by astute purchasing agents. They know a small company can't get more money for the same thing than a large one. They followed National's prices but couldn't learn them until they were published. Moriarty never told them until he told the world. That was the plaintiff's proof, and I believe it, and I find that the parallelism of action here which plaintiff construes as constituting proof of an implied conspiracy here is really the result of a strong and informed competition.

Now, Mr. Suttie testified, he being an officer of the American Steel Foundries, that after the United States decontrolled, and OPS ended, he published his price list in the Chicago Journal of Commerce. To

me, that is pretty fair evidence of a company's willingness to tell the world what its prices are. He also related that Moriarty told him that he, Suttie, was getting too much business, and he told Moriarty his superiors told him to get all the coupler business he could, and that that was what he was trying to do.

O'Kane of Buckeye said he was trying to get all the business he could and that the number of his customers had doubled since the dissolution of the agreement.

What Suttie and O'Kane said was amply factually demonstrated by ASF Exhibit 66–165A, and Buckeye's Exhibits 383 and 384, which we have previously discussed, all of which, by animate and inanimate witnesses, demonstrates that prices herein were the result of legal competition and not of illegal lack of competition.

Another circumstance here which cuts both ways, these exhibits which prove rather fierce competition since 1945, prove equally well the plaintiff's contention that there wasn't any competition before 1945.

So my question still is: what misconduct obtains and exists today susceptible of and requiring an injunction?

Now, there were some animate witnesses on price-fixing, too, and all animate witnesses testified there was never a conspiracy or combination here or any agreement to fix prices.

It may be ever natural for the accused to deny a charge against him; it may even accord with their instinct of self-defense. We have all observed that as lawyers. But it seems to me these were intelligent, educated, honorable professional men, these were men to whom dishonesty in a court room would be as alien as a deliberately false reading from one of their own slide rules. To me they tell a completely honest story

of their businesses, and of the events with which we are here concerned.

I have often heard lawyers and doctors testify. I never heard testimony any more exact or cogent or correct than theirs seemed to be. And since Moriarty of National takes all responsibility of the alleged fixing of prices on couplers which he originates and which others imitate, we will consider Moriarty first.

I believe his testimony that prices went up and down from year to year, depending upon conditions. Prices are increasing on everything else. Why shouldn't they on couplers?

I believe that until he made up his own mind he did not tell his prices to anybody, as he testified, and that after that he told the world he sent copies to customers and to the public, including even his competition, as a matter of courtesy and convenience. And I think from observing him he would be courteous to anyone, even a competitor.

I believe others followed his prices, as they have testified. I believe they couldn't charge more for the same exact thing and get the business at all; that they couldn't charge less and get the business because National would have to meet their competition if they did so.

I believe in the three-month interval between OPS and the filing of this petition that it was perfectly natural for all defendants to continue to follow the uniform prices theretofore obtaining under Government control.

Mr. Moriarty testified that in his company he had complete jurisdiction in pricing; that he did not confer with any of his competition on prices; he did not even confer within his own plant, except to get the data which he needed to set a price. He assumes entire responsibility for prices. He has never had any

agreement with anybody on prices. When the OPS authorized a 5 percent increase he refused to follow their suggestion because, as he testified, he couldn't justify their suggestion by his costs. That sounds like an unusually honest and honorable gentleman to me.

When he says he set his own prices I believe him. And when others say they follow his prices as a matter of uniformity because they can't make the same identical thing he makes any cheaper than he can make it, I believe them.

I think we are here dealing strictly with the law of supply and demand, the mathematics of costs and the vagaries of economics, and it is difficult for me to see wherein any of these natural results can be properly considered as susceptible of injunction.

On the other hand, when others put their prices below Moriarty's, he always followed the lowest price to meet the competition. What other method could he or they or anyone else use? He gathers together all the data he needs and he alone decides the price. And because of the position his company occupies in the field others imitate that price. It is sent to all their customers. They send it as a matter of courtesy and convenience to anybody who wants it, including competition and everybody else. Others, for the reasons given here in their testimony, as far as couplers are concerned, follow the leader, National Malleable. They all sell the same identical thing.

To me it seems a perfectly natural thing that they do so. And, indeed, from their testimony what else could they do, since they must meet their competition?

I believe nobody here conspired or combined or agreed to do anything unlawful. I believe we can't enjoin Moriarty from thinking, from figuring out what the cost ought to be based on, economic, business

conditions, changing labor costs, changing commodity costs, and other data he described. We can't enjoin nature, which so operates when an article is offered for sale that whoever else offers the same thing is in a position where he can't charge much more. You can't enjoin supply and demand.

You can enjoin only such wrong as is susceptible of injunction. I think similarity or uniformity of price here has come about in a purely natural way, not the result of any combination, but the result of intense competition.

What happened in the business, as some took business away from the others, and lost it in turn, proves that. I believe the testimony of the men who said they fight for business because the business in its ups and downs, from these exhibits, proves exactly what they say.

Now Emerson once said that "What you are talks louder than anything you can say." Here the changing course of business, the way some take business away from others, the way sales go up and sales go down, the graphs which prove the degree of change, all of this talks louder and more convincingly to the effect that there is a healthy competition here and everybody is getting all the sales he can.

These facts and this evidence in exhibit form talk louder against the theory of illegal combination than do the suspicions of plaintiff's counsel or any contrary evidence which plaintiff has produced. In fact, to the evidence which I have mentioned plaintiff produced no rebutting testimony at all.

And not only do the changes in their sales so prove by circumstance that there is here no illegal combination or agreement, but every witness in the case who was inquired of on the subject without any exception so directly testified. Some witnesses testified they

would learn from their customers if National had put out a new price list and they would then call or write National to get one.

I see no impropriety in that.

Mr. Suttie of American Steel Foundries said he had to follow National's prices because the parts were all to exactly the same specifications and of the same standard quality so that no railroad would pay any other price for the same identical thing. The only difference was the imprint, the name plate on the parts.

His testimony and his reasoning sounds very cogent to me. It lends credence to the defense that prices are a matter of economics and competition resulting in a price to the public which is the result of the law of supply and demand and not the result of an unlawful combination.

It is claimed here that there is today allocation of customers. I think each defendant gets all the customers and all the business he can. The graphs which we have mentioned so prove.

I find no convincing evidence on this subject of either quotas or allocations. The chart compilations here are irrefutable. Of course, they contain only that period of time after 1945. Plaintiff made no effort to meet this evidence. Plaintiff in argument ignored this evidence.

When I consider the preeminent capacities of plaintiff's lawyers as they have so well demonstrated throughout these weeks, I believe they stayed away from the subject because they realized that this feature of the defense is absolutely true.

I find it true. I find that since January 1st, 1945 all of these defendants have been making every effort to hold and get customers and to take them away from each other because there is no other business to get.

What business there is contracts and there are no future possibilities of expansion in this business. One is limited to what he can take away from somebody else.

The third circumstance here is the Mechanical Committee, and it is suggested that its activities are circumstances here proving an illegal combination.

Mr. Kerr for the defendants said that the Mechanical Committee serves a useful and lawful purpose. I believe it does.

Its work is scientific and mathematical and precise. I do believe patent or legal considerations have no influence whatsoever on what these precise scientific engineers do in their work. Theirs is an exact science.

They were criticised a little bit here for having read the reports of the United States Supreme Court, but I do not believe that such reading had any deleterious bearing on the work they do, nor any insincere connotation in its having been read.

From my observation of these men, I do not believe any consideration would cause them ever to produce any device but the best they could put together. I do not believe they would tolerate or permit any perversion of their art for any unlawful purpose such as would endanger the men who couple trains or those who ride them.

As to the Mechanical Committee's holding its own drawings and gages and the claim of their denying others access thereto, I do believe that whatever was done in this respect was done in the interest of standardization and in the interest of protecting standardization and in the interest of the safety of passengers and crews on trains.

I agree that standardization is necessary to prevent the manufacture of obsolete or inadequate parts which

would endanger those who ride and those who work that others may ride.

Plaintiff's counsel suggests there is some illegality in the way in which the Mechanical Committee holds onto its drawings and gages; that this sort of secrecy indicates some unlawfuness in the way it retains its own property. Plaintiff's counsel is under the impression that the duplication of this coupler would be a prodigious and impossible task, and that it would be a terrible injustice if a prospect who wanted to get into this business had to go to some one of these defendants or the Mechanical Committee with his hat in his hand and ask, "How to make this thing", as counsel says.

What a catastrophe that if he wants something that somebody else now has as the result of that person's own creation, that he should have to ask his so-called competitor for it. Obviously if the defendants are his competitors, they have no way of knowing it as yet, have they? And the fact that he must ask is in itself a violation, plaintiff suggests.

Just what must manufacturers do to keep within the law? Must they go around with their drawings in their hand offering them to those who might possibly be enticed into becoming their competitors? Is it wrong to create something and to possess it and to wait for someone who did none of the work to ask for it? And if you want something that belongs to somebody else, because he put it all together, and you didn't put any of it together, were we not told long ago to "ask and we shall receive"? And whether one's hat is in his hand or not, it seems to me it is more just to tell one man to go through the red tape of speaking up for himself than it is to make a criminal out of one who didn't give up his possession because a prospective manufacturer who doesn't yet exist—accord-

ing to the testimony in the case to date—has coveted his neighbor's goods and is willing to take them but is not willing to go through the indignity of asking for them.

It is my impression from what I have heard here that these defendants do a beautiful job mechanically of casting their parts, because to cast something means to throw—like casting a die or casting a fishing net. And in the early days they threw or dropped the hot metal into molds wherein patterns had once been placed to form an emptiness or vacuum, and after the metal cooled they then removed the sand from the box and they had a little piece of cast iron conformed to the hole in the sand which had been put there by a pattern.

You all know the calibrations on a one-inch ruler, the twelve little parts that go to make an inch. These men have mastered their art by their genius to the point they cast or throw their hot metal into a receptacle of some kind and it emerges to within one thirty-sixth of an inch, to a point where it takes no machining to complete the article.

The little machine that we had in here, the little coupler that we had in here looked very pretty and it was intended to look pretty. When you fellows are going home on the railroads tonight, take a look at the freight train on the adjoining track and look at the couplers. You won't find any of them shined up.

What a job to make these parts to within one thirty-sixth of an inch by casting. And it comes out so perfectly it doesn't require machining and it never requires lubrication. It works till it wears out. Who could improve on that?

You lawyers who work in Cleveland are well aware that this is a machine shop city, a city of toolmakers

and gage makers. We make the tools which make the tools. But whenever we get a thousandth of an inch on a part, it takes machines. Our more precise work is in ten-thousandths.

I have seen a piece of steel expand a certain number of millionths of an inch when I tapped it with my forefinger because one-twentieth of a second of the heat from your forefinger can cause a piece of metal to expand a millionth of an inch. We have machines around here which so record.

What a wonderful thing that these people can turn out their product just in the form of a cast or casting. One wonders how any of us could improve on their work.

The more I hear about the Mechanical Committee, gentlemen, the more I marvel at the perfection of its productions.

Now as to the ircumstance of reciprocally revealing costs and of plant visits and royalties.

If there were no competiton between these defendants such as has been well and mathematically proven, I could understand the suspicions of plaintiff's counsel on these subjects. But as long as they are all giving each other a well-proved battle royal to take each other's customers away from the other fellow as well as they can, I see no legal harm in their fraternizations.

There was lots of visiting back and forth here. Engineers do it, just like bar associations, just like visiting lawyers and judges.

It seemed to me that the men who did the visiting gave far more cogent and logical reasons for it, and reasons far more true than the suggestion that it was all part of an illicit combination. They went to see new furnaces, new processes, new methods, and they went to many foundries belonging to many corpora-

tions other than these particular half dozen defendant companies.

When you listen to these highly-educated and trained engineers explaining their purposes and the benefits they or their companies derive in thus learning from others, the suggestion that it is all to facilitate a 40-year-old conspiracy becomes most untenable. Indeed, instead of a circumstance tending to prove guilt, it proves the contrary.

I don't believe or find that these defendants reciprocated cost information to get prices up, as part of an illegal combination at all. I think they did it to check costs with each other so that they could get their costs down.

I believe the evidence so shows. There was no chance to get labor and material costs down, so they checked costs with each other to see what else they could get down, and they gave pertinent examples of it to me. I find that plant visitation was all for the same ultimate purpose, to improve their work, to observe new machinery, to observe new methods. All done ultimately to reduce costs, because these defendants must compete with each other even in efficiency, because labor and material was increasing costs so much in one direction that it behooved them to cut costs in every other direction, if they could.

I find getting costs down by either of these methods of imitating the other fellow to cut costs or learning more efficient methods to better compete with him ultimately keeps prices down, too.

I find that cost information was here exchanged to improve productive efficiency and to lower costs. If costs were to be lower, it could come only from such costs because labor and material costs were beyond everybody's control.

The professional meetings of accountants had to do with an exchange of technical, theoretical professional ideas of organization in the steel castings industry. From the testimony they never had any discussions of pricing problems.

As to royalty reports, many industries and businesses furnish reports to others of their activities, such as trade associations, credit associations and others. I can see no violation in furnishing such reports.

They all show, insofar as this case is concerned, that the little one gets more business and the big one gets less. So I cannot see wherein royalty reports have the efficacy which is here claimed by the plaintiff's side.

Now the circumstance that lack of new venture capital proves that others are unlawfully excluded from this industry is something we should consider here.

There was a lot of talk about why no one else gets into this business, why in all these 50 years only three or four people asked. If it's so good why does everybody keep away from it except a few that were in it in the first place?

As to any inquiries seeking to get into this business since 1945, National alone received one in these last 13 years, and no other defendant even knew they had it. And the one it received, as I will mention later, I do not believe was of any serious consequence.

Now Mr. Kerr cited some economic factors which he said would account for the failure of others to go into this industry. He mentioned that the present capacity was adequate to meet the demand; that they are in a shrinking market—they have less cars now than 25 years ago; that special rigging and equipment would be required at great expense; and that their

licensing policy to give licenses to any qualified manufacturer is fair to all.

Plaintiff claims that since no new competitors have come into the business that they have therefore been kept out. That's the intimation they make and the circumstance they wish me to follow.

Not once in all these weeks of trial have we learned of anybody in particular who desired to actually get into this business and who had the competency to get in the business, who was kept out.

I find that nobody ever wanted to get in. I find that nobody was kept out.

And the evidence before us and common knowledge on the subject indicates some good reasons why new venture capital would avoid it. The circumstance that no new candidates applied is no more cogent than the circumstance that any candidate with money would be very careful about applying. Venture capital is what we call "smart money," gentlemen. It doesn't make any silly mistakes. The question here is would it not have been silly and ridiculous for them to get in this kind of a business.

Now to prove its contention plaintiff has dug up over a half century search what it considers as real applicants for the business. I find from the evidence before us that the Ohio Brass, which is one of their candidates, if I may call them that, never intended to manufacture the standard coupler at all and so stated.

I find that another of these four or five over a 50-year period is the Maritime Steel matter. No license could be given them since the license for Canada had been given to the Canadian Steel Corporation to whom they were referred. They are an outfit looking for what those in the theatrical business would call an "angel". They want somebody to finance them.

They'd get into the business if someone else paid. They had their hand out, too.

In the Southern Railway matter I find no proof to show defendants combined to exert the pressure herein claimed. Southern Railway weren't serious at all, and said so. They used the expression they were only "toying" with the idea. So I find Southern Railway never asked for a license and the evidence shows they didn't want one. As they said, they were toying with the idea of getting into the manufacture of coupler parts. When people "toy" with ideas, the Court shouldn't take them any more seriously than they did themselves.

In the Pratt & Letchworth matter we find they wanted information on the necessary procedures to manufacture a yoke, namely the Y–30.

They were told to whom they should write, to Symington-Gould who designed that yoke and to Buckeye who had a patent on the pin support. They were then told to ask the Chairman of the Mechanical Committee for drawings. They asked how to do that and they were told how to do that, and they were never heard from again.

To me none of this 50–year evidence in these four isolated cases or instances constitutes any circumstance in plaintiff's favor. To me it proves the exact opposite of what the plaintiff claims for it.

It is further said that suits were improperly threatened by some of these defendants here as a matter of pressure, patent suits. They were going to be brought in three or four instances in over a 50-year period, namely in 1921, 1924 and in 1940.

May I say, gentlemen, if that's all the patent suits that were ever threatened, there wasn't any barratry involved.

Who has a better right to sue over patents than the patentors who are given such right by another branch of our own Government? Since there has been no such suit threatened in 17 years, it doesn't concern our injunction suit here very much, does it?

Plaintiff here says others are improperly kept out of this business. The defendants have proved nobody wants in.

After so proving the defense offers some very cogent reasons as to why nobody wants to get in.

We have a 20-page exhibit here—well, I can't quite find the name of it but it is this blue book which you all have, National Malleable's Exhibit 294, indicating it would cost a little over $900,000 for a foundry already well-equipped with its own machine shop set up, a foundry already in a going business, with its own plant in operation and with space for such use to become equipped to make the type of railroad parts with which we are here concerned.

There is evidence here by defendant ASF that the railroads are in an industry which is in a condition of contraction. Defendant ASF suggests that railroads are going out of business and losing business; that planes and buses are picking up their passenger service; that trucks are picking up their freight business. It is a matter of common knowledge that the industry is in some state of contraction; that planes give much faster travel to passengers at practically similar costs; and that buses charge passengers about one-half as much; and that the trucks which carry freight from door-to-door have become a great convenience to the public. And door-to-door means you are only dealing with one transporting company, and when you deal with a freight train you have to hire somebody to take your produce to the railroad dock, you pay the railroad to move it somewhere and then

you pay somebody else to move it from that railroad dock to its destination. The trucks move door-to-door. They are a great convenience, gentlemen.

On the other hand it is equally a matter of common knowledge that capital of the size required here seeks to enter businesses which have a fair chance to both profit and expand. New science and arts now claim the attention of prospective capitalists. The aircraft industry does not have to buy the airports. Buses use the public roads. New capital has little interest in the purchase and maintenance of heavy equipment, tracks, roadbeds, bridges, signal equipment, and depots. I do believe that no part of the railroad business today has what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and its future is comparatively dismal alongside of the investment opportunities in the ventures which entice America today, such as in the electronic and nuclear fields.

None of this was in the evidence except that which was said about buses, trains and planes. We all know as a matter of public knowledge investors aren't going to put their money into anything except that which looks like a winning venture with a capacity for some ultimate actual profit. As a matter of circumstantial evidence it is far more probable that venture capital stays out of this business because it doesn't want to get in rather than it is kept out by unlawful combination.

I find that nobody of the industry here decided to keep anybody out. The ones on the outside never evinced any desire to get in, and that means that over a 50-year period not one applicant evinced such desire. The reason why they wouldn't are very apparent and those reasons are not the result of any illegality.

Transportation ever changes in this great country. The Ohio Canal made our city great back in 1832. A few years later came the railroads and the Canal went out of business. Buses, planes and trucks now push these railroads around a little bit.

Railroads are selling their depots. No railroad today can afford to replace its own bridges or buildings. Since our case began here—it doesn't hurt to say it for it cannot influence any jury very much, nor will it concern any finding I am making—our oldest railroad, the B. & O., asked for the privilege of ending its passenger service, and the two biggest wish to join each other, I presume if the within plaintiff doesn't object.

It's what we call in the divorce court a business marriage and here necessity is the shotgun. Up to now these two great railroads would never get under the same roof anywhere. Every road in Cleveland goes into our Terminal Building but one, and when this lawsuit was just middleaged back in the 1920s and 1930s, the same two built great monumental depots in New York City so they could tell the world, in a sense, that no love was lost between them. But times have changed. All of this is worthy of illustration though it is not a circumstance before us by way of evidence.

Another feature which concerns venture capital is its desire, if it can do so and it has the choice to do as it will, to avoid any business subject to Governmental regulation, even though it be common carrier.

And I ask each of you good lawyers, forgetting the record and forgetting the lawsuit, since we had rent controls, which one of you ever heard of anybody in the form of venture capital who built one single house so he could rent it? At the same time, the venture capital which will no longer go into private homes

will buy into industry which produces what goes into homes, such as cement and lumber and glass. The analysis of what causes people to invest or not to invest is a study far beyond our task today. But from the viewpoint of circumstantial evidence, the fact that no serious new investor took this business seriously in half a century doesn't prove that the door was shut against them. To me it proves they were too smart to step into any such financial trap.

Mr. Bernstein in his closing argument says that the defendants here have an intent to monopolize and that in favor of his contention is the fact that no new manufacturers have come into the picture in a long time. Against this contention is all the evidence we have had showing no serious competent applicant ever has applied, in addition to which it does appear to me that venture capital would be too intelligent to get into a business with no capacity for profit and no possibility for expansion, as I have outlined. This business never looked as good to venture capital as it seems to appear to the plaintiff.

Mr. Bernstein argues as to how defendants react when prospects appear who are concerned with the business. And from the activities of these various defendants he thereupon argued they just wouldn't let anybody in.

Now the truth is, gentlemen, that applicants of no really serious nature ever appeared on the scene except at very rare intervals and many years apart.

And the strongest conclusion one comes to is not how defendants reacted to keep them out, but the strong conclusion one gets is how repugnant this business must be when it elicits so little interest. It must be repellent because nobody wants to gamble when there is no chance to win.

I believe that is why there has been no venture capital here.

Circumstance No. 6 has to do with improper patent control.

The evidence shows that after the end of the Trust Agreement in 1944 there was need to continue patent licensing to enable manufacturers to avoid infringement. They were renewed on a two-year basis up to 1956, and are still in process.

Plaintiff's great complaint on this is as to the method. Since the protection of the people requires the continuity of some system of scientific and progressive efficiency such as has been hereinbefore utilized. I can find no illegality in the preservation of that efficiency in the same hands as heretofore. The suggestion of change, in what amounts to the custodial care, suggested by Mr. Bernstein, of all these instrumentalities might or might not be effective. I don't know. It certainly isn't our function to authorize such experimentation with somebody else's property and somebody else's industry. Ours is to decide whether there is such current illegality here as to require current injunction.

It is true that after 1945 non-exclusive licenses were issued by defendants to each other. Price-fixing from that time on was eliminated, quotas thereafter were eliminated, concert of action after '45 was eliminated.

Since 1945 non-exclusive patent licenses have been issued to accomplish the interchange of patent rights necessary to continue the manufacture of the standard coupler, and these have been kept up on a two-year basis to date.

I can see no illegality in that.

Mr. Bernstein objects to the method and system of those who have patented these products and who have

joined their various geniuses to standardize parts in the way in which they have issued licenses.

He says, and I quote, "They impose themselves as the authority to issue licenses." Since it pertains to their own patents in which the Government has guaranteed their property rights for the purpose of inventor encouragement, who else has any better right to exercise such authority?

And if patent laws give them authority, then can it be justly complained that they impose authority on themselves just because they decide how they will share it with others? If those having rights are not to be fairly permitted to share them with those to whom such rights can be safely entrusted, then shall some other agency be invented to hold and dispose of such property rights? I find from the evidence that no applications for licenses have been made since 1945, thirteen years ago. Since nobody wants one and nobody asks for one, I cannot consider in today's case for injunction this invisible man who has been conjured up with a hat in his hand and who has been around here for twelve years, if he exists.

I must find that since there has been no evidence that anybody wants one, that for lack of such proof, nobody wants one.

The National Malleable witnesses have said it is their policy to consider any qualified manufacturer for a license. I don't believe any qualified manufacturer has applied. There has been no such evidence here. I don't believe anyone has ever been excluded except that imagined personality that was invented here in the process of the case.

We find that Buckeye holds no patent here whatsoever. It operates on licenses from someone else to make what they have patented. The royalties are so nominal that a non-owner is at no disadvantage

whatsoever. Royalties are never equal to one-half of one percent of the selling price, so the owners have taken no advantage whatsoever of the non-owners.

The Government has here suggested that the method followed in the renewal of licenses is a factor of what they consider a conspiracy herein. The success of Buckeye since 1945 disproves the claim. Holding no patents, operating on licenses from others, receiving them without asking for them as they have testified, they give the patent owners the biggest competitive headache they get.

There has been some argument of counsel here which deserves particular mention.

Mr. Davis in argument calls attention to the fact that plaintiffs changed their theories during the case. He says they originally charged that after 1945 the manufacturers met and by discussion would fix prices among themselves and make agreements, and that later National would announce results and others would follow. But that they didn't then claim that National would make its own independent decisions and that others would follow as the evidence they had adduced has since disclosed.

I find herein that Moriarty did make his own independent decision on prices for National, and I find from the evidence of plaintiff that all others then followed National's prices as to couplers, in particular.

It does appear that as to this phase of the case the plaintiff shifted. It does appear that plaintiff did not amend. It does leave plaintiff to some degree in a situation wherein it seeks to advance the theory here that parallel business behavior on the point of similarity of price constitutes a violation of the Sherman Act, which it does not.

Counsel for Symington-Gould suggests here that if the plaintiff is right then a lot of fine people must have committed perjury. He says they get National's price list first from a friend at the New York Central, and then they call and get a copy. But they never got a copy until after it has gone out to the trade.

I find from all the evidence that this is how it was done. There is no evidence to the contrary and I believe all those witnesses spoke the truth.

Plaintiff here contends that two-year leases imposed quotas on the little companies. Plaintiff's Exhibit 1143–1781 shows on tons shipped little Symington-Gould had 18.23 percent of all coupled business in 1954, and ASF, a big one, had 16.59. Mathematics can be very convincing, gentlemen.

Symington-Gould's official said that after 1945 the new licenses opened the way to solicit business everywhere. The doors were opened wide. I find that the mathematics here submitted have so proven.

Mr. Sellers for McConway & Torley says that while plaintiff's counsel cited 316 U. S. 265 and 306 U. S. 208, he forgot to cite 346 U. S. 540 which overrules the two cases previously mentioned.

He also denies that the defendants are dominated because licenses must be renewed, and says his company receives them every two years without even asking for them.

He says they get all the business they can and the figures which we have particularly shown for them indicates that that is true.

Now Mr. Thomas for the AAR argues that the Bernstein proposal for changing this whole operation as he outlined it in argument would undermine the standardization which the Government has heretofore approved. Mr. Kerr had previously argued it would

deprive defendant manufacturers of rights guaranteed by another branch of the Government.

Frankly after I heard how Mr. Bernstein was going to put the Court into this business, and after I heard his ideas as to how the business could be run right, if they weren't only so cheap, as he stated in his argument, the more I heard of his substitute committees, the better the present system looked to me, with all due respect to Mr. Bernstein as a lawyer.

But my first concern is always as to whether or not plaintiff has here proved its case. Mr. Thomas quotes Mr. Bernstein as saying that the AAR has done something unwittingly here in failing to police what others have done. Unwittingly means unknowingly, unconsciously and not intentionally. Defendant AAR is really here charged with intentionally doing something which it did unintentionally. They are accused of being an unwitting conspirator.

I must confess that I have participated in criminal practice many years, both in prosecution and in defense and on the bench, too, and a charge of having been an unwitting conspirator is one I do not quite comprehend. I have always believed that a conspirator had some consciousness of the existence of the conspiracy of which he was a part.

Mr. Thomas says that under the AAR rules any railroad may accept cars not equipped with standard couplers, and that no rule requires purchase of any special coupler. They recommend only adoption of standards. He says that they have encouraged, approved and recommended many railroad parts whether certain defendants liked it or not, and that they boycott no one.

Mr. Thomas says, and he argued quite logically on the subject, that Mr. Bernstein's proposal if ever put into effect would result in boycotts. Mr. Thomas gave

us a detailed history of events in his Association, and I believe that what he said had a ring of truth in its every word. And I believe that he spoke truly when he attested to the honorable dealings of his clients over the years.

There is something about the ring of truth, which a great writer, Alexander Dumas, mentioned as having been strange when you hear it in a court room. And in his book on Les Miserables, the miserable, he said that when truth rang out even the judge had to listen.

Mr. Thomas gave his recital on what his Association had done, I say again it had the ring of truth in it. I agree with Mr. Thomas that Mr. Bernstein's suggestion as to how this business ought to be run would not give us in this instance any panacea.

I agree with Mr. Thomas that his people boycotted no one.

Now Mr. Bernstein in his final argument said that no one will appear on the horizon tomorrow to go into this business. Well, I think that is quite true because no one has appeared on the horizon for the last 50 years to go into the business.

I don't think there is any question but what plaintiff's witnesses here who were connected with the defendants' case also told the truth throughout when they said there was no combination. I noticed the engineers in particular—and they have come in for a little criticism in this particular—they were so anxious to explain their answers particularly on engineering problems, because in their work whoever asks a question must be given a mathematically complete answer because otherwise terrible consequences might ensue, to the point where to cut down on a lot of conversation not legally responsive, defense counsel had to ask me a number of times to strike the unre-

sponsive answer of these witnesses. They were so anxious to talk they couldn't stop. I have always found men that did that quite honest. They are too anxious, one might say, to limit their answers, and I am not thinking of verbose individuals because engineers are not.

Mr. Bernstein asks in his final argument, would the defendants license an outsider at nominal royalties today? I don't know the answer to his speculative question. And since no competent bidder ever appeared, one doesn't know.

Mr. Bernstein says, "Let us predict the future." As I have said, gentlemen, in this business there is no future. The railroads as a class are appreciated in wartime because no one else can move heavy material in bad weather, and no one else gets through in floods or catastrophes. But other than in this one war service, as a rule their contribution to industry is quite unappreciated except by those who know them well.

It does appear to me as if the contraction in their business will result in a constriction and ultimate strangulation. I don't know what Mr. Bernstein meant when he said let us predict the future, but I do believe in this business the lack of future is what has kept others from investing in it.

Mr. Bernstein argues that there is monopoly here. One of the general characteristics of monopolies is that we find them in good businesses which are profiting and expanding, which everybody else wants to get into, and we have people on the inside who have such a good thing they do not want to let anybody else in because they are so jealous of the good things they have. We are not dealing here with any such attractive future possibility.

This indicia of monopolies is conspicuously absent here. I see no such monopoly going on today. I see no cognizable danger of recurrent violation here.

If there has been violation in the past, and I am really not called upon to find there has or has not been up to 1945, there is surely no cognizable danger of its recurrence today, thirteen years thereafter. Whether or not there has been a violation in the past, my question here is as to whether or not injunction is required today to forestall future violations.

Mr. Bernstein talks about the American Tobacco case, 328 U. S. 781, and instructions to a jury in such case, which instructions were approved by the Supreme Court. And he defines monopoly as being a joint acquisition or maintenance, from such case, of a conspiracy formed for the purpose and to such extent that they are able to exclude others from such business, accompanied by intention so to do.

I find no unlawful acquisition, no unlawful maintenance, no unlawful exclusion, and no unlawful intention here.

I find quite a battle for business among these defendants in an industry so unpreposing that in a period of 50 years no manufacturer of any competence was ever interested in entering the field. One or two letters evinced no such interest.

If rivalry is a stimulant to industrial success, which was another test mentioned by Mr. Bernstein as he quoted from these decisions, then surely the rivalry here over the last thirteen years indicates that this is not a monopoly.

Mr. Bernstein quotes another U. S. opinion to the effect: "No monopolist monopolizes unconscious of what they are doing."

Now, it is time the AAR learned of that because they are here accused of having gone into a monopoly unwittingly.

As to Mr. Bernstein's final suggestion as to how this industry should be run; I must say I cannot agree with him that the Court should experiment to the extent he asks, and I must say I see no particular efficacy in the suggestion. I can understand his opinion on the law, and I can understand his opinion on evidence, but when it comes to running somebody else's business, gentlemen, even if it isn't in the record here, it is worthy of comment that there is a human tendency to recognize a weakness in another when he's on the job—and every time you sit and look at television you imagine how much better you could do if you were only in that boxing contest, you can tell exactly when some fighter should have ducked, you can tell exactly how he should have swung and what kind of uppercut he should have brought up from the floor; when you watch a football game you can see so many opportunities of interception and you wonder why these athletes don't intercept and you figure you could have intercepted; it's got so we build special places, at least in this town, for observers who are called sidewalk superintendents to watch buildings going up and figure how much better it could be done—and I do not say this critically.

I am trying to get at the proposition that we lawyers cram our minds for a lawsuit this week and empty it Sunday afternoon and get ready to cram our minds for another lawsuit next week. Our great art is the capacity to fill our minds and then empty them as if it were a sieve to get ready for the next case.

Jim Davis had to argue a case in the United States Supreme Court within the last week in the middle of

trial here. He had to forget all about this six-week venture in this room and go down there, and then he had to forget about his case there—and he hasn't yet told us how he came out—and get back here and then cram himself about this. Our art is to get it together and then tear it apart for the next lawsuit.

We should leave the engineers to their own field, because generally, and I do not say this unkindly, I have noticed all my life when lawyers become businessmen or turn into real estaters or insurance brokers they always become that much less of a lawyer, and I think we should go on the assumption here that these people have done a good job and they know better how to protect and preserve their industry for the benefit of these United States than we who learned it for the purpose of a lawsuit and must forget it for the immediate purpose of the following lawsuit.

I find that the case of *Cole* vs. *Hughes Tool,* 215 Federal 2nd 924, has application here. In the facts which it outlines it has more facts resembling ours than any other case in the books, I believe.

I do not find the *Interstate Circuit case* 306 U. S. 208, of application. I cannot find for the plaintiff on it that as a matter of law, as plaintiff suggests, he is entitled to such finding. I see no cogent similarity between that case and ours.

I think the case of *U. S.* vs. *Grant,* 345 U. S. 629 is of direct application here. It requires a cognizable danger of recurrent violation of which I here find none.

The same is true of *U. S.* vs. *Oregon Medical Society,* 343 U. S. 326, stating that the sole function of injunction is to forestall future violations of which I here see no danger.

I would like to make one observation here. I believe that all of the graphs before us, all the information before us as to the proof of the intense competition between these parties since 1945, and the fluctuation of their sales as they all fought to take some part of that 100 percent of the business away from each other for there was no other business they could take or procure, if all the proof before us here about the efforts these defendants have been making in competition with each other since the wraps of the Trust Agreement have ceased to limit them, if all that was known to Lewis Bernstein before the civil and criminal actions were filed, I do not believe they would ever have been filed.

In our war with the criminal class we always ask them what they have to say about any crime of which they are accused. In criminal procedure we give all a chance to talk so that if their defense be that their act was excusable or justifiable or accidental or in self-defense or intentional or not, they may have the privilege of saying so.

Here it seems that all these defendants were ever asked was to furnish information against themselves. And our legal life is so constituted that the defense later on didn't dare expose its defense after these actions were filed.

It is a shame that somewhere along the line Mr. Bernstein didn't know of the compilations of these graphs showing the fluctuations of these sales as appear in this particular exhibit showing how some went up and some went down and only one appeared to be stationary whatsoever, and how the big ones went down here and how the little ones crept up in the years particularly between '48 and '57. This complete mathematical demonstration of the falsity of the premise of the plaintiff here is assuming that just

because there are so many people in the business they must keep everybody out, and because they once fix prices they must now be fixing prices in the same way as was outlined, as Mr. Davis claimed, in the petition here. Of course the proof had to do with a different matter, namely, that of following the leader, as it is called.

It seems unfair that men of the high standing with which we here dealt, and companies of the high standing with which we have here dealt, should suffer such stigma and disgrace and publicity, and financial loss, and they and their familiaries and friends should be so chagrined, when it was all avoidable in the first place, had all the facts been known—and I blame nobody because that seems to be the regular system.

But it does seem comparatively unfair that they do not get the same rights as would be given anyone else accused of any other kind of crime. I will say again, having observed the competency and fairness and courage of Government counsel here, I do not believe if he originally knew the material which was evolved on this defense that we would be here at all. And I say that because I honor and respect him.

Now all of you lawyers must appreciate that I cannot here cover every possible difference of opinion between your contending sides on each and every item on which you have differed over all these weeks.

I have tried to keep track of this evidence with voluminous notes, and I have sought to follow and digest or agree with or disagree with every point all counsel has made for the purpose of telling you crystal clear what I ultimately find from all the evidence in the case and all the law you have cited to me.

I find no conspiracy and no unlawful combination here whatsoever, nor any unlawful price-fixing or quotas or improper controls over littler companies.

I find that the evidence discloses that lack of any inquiries since 1945 as to the possibility of getting into the coupler manufacturing business is due to economic causes which have been mentioned, and not to any illegalities on the part of these defendants. I see no requirement whatsoever that injunction be here granted.

I find that there is no activity going on at the present time or likely to occur in the near future which is either properly susceptible of injunction or which would justify equitable relief in any form.

I cannot recognize any need for this Court's attempting to operate this industry along the lines of Mr. Bernstein's plan.

I find that this complaint should be dismissed in its entirety and judgment rendered for defendants.

I now ask counsel at your early convenience—and it applies to all counsel—to submit written findings of fact and conclusions of law and journal entry in accordance with my verbal findings herein.

I thank counsel for the honor of your having graced our court room for these past two months.

All of which is said to the objection and exception of plaintiff.

APPENDIX B

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. 30281

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, THE SYMINGTON-GOULD CORPORATION, MCCONWAY & TORLEY CORPORATION, FOUNDRIES EXPORT CO., INC., AND ASSOCIATION OF AMERICAN RAILROADS, DEFENDANTS

JUDGMENT

This cause having come on to be heard, was tried to the Court without a jury, and was submitted on the pleadings, the stipulations of the parties, the evidence, and arguments of counsel.

The Court, after due deliberation, having rendered its decision, and having filed its Findings of Fact and Conclusions of Law, comes now to the entry of judgment herein.

NOW THEREFORE, by virtue of the law and pursuant to the Court's decision and its Findings of Fact and Conclusions of Law, it is ordered, adjudged and decreed that the Complaint be and it hereby is dismissed, with prejudice.

/s/ JAMES C. CONNELL,
United States District Judge.

Dated: March 12, 1958.

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 160

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION TO AFFIRM BY APPELLEES NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, SYMINGTON WAYNE CORPORATION AND McCONWAY & TORLEY CORPORATION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 160

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION TO AFFIRM BY APPELLEES NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, SYMINGTON WAYNE CORPORATION AND McCONWAY & TORLEY CORPORATION

MOTION TO AFFIRM

The above-named appellees move, pursuant to Rule 16.1 (c) of the Rules of this Court, that the Court affirm the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, in Civil Action No. 30281, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, for the following reasons:

1. This being a civil action by the United States requesting equitable injunctive relief, the granting or denial of that request lay within the sound discretion of the District Court.

2. Appellant, in its Jurisdictional Statement filed herein, fails to argue or show any abuse of discretion by the District Court, but rather seeks a trial *de novo* in this Court.

3. In a case based entirely on circumstantial evidence, the District Court's rejection of the inferences of illegality urged by appellant, and the District Court's acceptance of inferences of legality consistent with the circumstantial evidence and supported by the uncontradicted oral testimony of the responsible officers of appellee manufacturers, is not an abuse of discretion and presents no substantial question for consideration by this Court.

STATEMENT

This is an expedited appeal to this Court in a civil antitrust case, charging that appellee manufacturers monopolized and conspired to monopolize, and conspired to fix prices in, the manufacture and sale of standard railroad couplers.[1] In the trial of this case over a period of about two months, some 3,000 pages of transcript were made, over 2,000 exhibits were offered, and many stipulations of fact were filed in the Trial Court. As a part of its case

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[1] Appellee manufacturers consist of five defendant manufacturers of couplers; appellee, Symington Wayne Corporation, is the successor to The Symington-Gould Corporation. Appellant's off-record reference to the criminal proceedings (Jur. Stmt. 5) fails to identify National Malleable, the largest manufacturer of standard couplers, and its First Vice President, Moriarty, as the defendants who, rather than pay fines agreed to by appellant substantially less in amount than the probable cost of defense, stood trial and were acquitted of charges identical with those in the civil case.

in chief, appellant offered the testimony of almost forty witnesses, principally officers and employees of appellees.

Appellant stated at the outset of this case that "it would have a circumstantial case as to these defendants, and that it would not prove its case by direct evidence." (District Court's Opinion, App. A, Jur. Stmt. 24; Tr. 31) Illegality and the need for injunctive relief were to be *inferred*[2] from this circumstantial evidence.

The Trial Court, in a 50-page oral opinion, analyzed the contentions of appellant as to the inferences of illegality to be drawn from the evidence, and having judged the credibility of the witnesses testifying before him, rejected these inferences. Soundly exercising his judicial discretion, the Trial Judge held that no showing had been made justifying the extraordinary remedy of injunction (Fdg. 82).[3]

Appellant now asks this Court to review that exercise of judicial discretion by the Trial Judge. *It seeks to urge de novo on this Court the inferences rejected so categorically by the Trial Court.* We submit, however, that the uncontroverted evidence so clearly supports the Trial Judge's rejection of the inferences of illegality urged by appellant as to render any further argument before this Court needless.

Appellant, pre-occupied with fifty years of history (Jur. Stmt. 5-15), gives scant attention to the conditions existing in the railroad coupler industry *today*. As clearly reflected in the opinion (Jur. Stmt. App. A) and the Findings of Fact below, the Trial Judge considered these present day conditions to be of fundamental importance in concluding that there was no necessity for the issuance of any relief.

One of the most striking features of this industry, as viewed by the Trial Judge, was the fact that standard rail-

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[2]Emphasis throughout is ours unless otherwise indicated.

[3]The Findings of Fact and Conclusions of Law of the Trial Court are Appendix I hereto.

road couplers manufactured by each of the appellee manufacturers had to be "exactly alike and completely interchangeable and fungible."[4] (Jur. Stmt. App. A, 41). As appellant recognizes, the six basic parts of a standard coupler can be interchanged with the same parts of that particular type of "standard coupler regardless of which manufacturer produces the part or the coupler." (Jur. Stmt. 13).

Notwithstanding this identity of product, the record before the Trial Court overwhelmingly and without contradiction attested to the vigorous, intense, cut-throat competition existing since 1945 in this industry, characterized by the Trial Judge as "what is colloquially called a cat and dog fight, for business and survival." (Jur. Stmt., App. A, 38).

Appellant, recognizes, as it must, that appellee manufacturers "have actively competed with each other for business." (Jur. Stmt. 18).

The patent-owning appellee manufacturers, since 1945, have granted non-exclusive licenses to each other and to the non-patent-owning appellee manufacturers at nominal royalties under their complementary patents to manufacture and sell standard couplers without any restrictions on the licensee's business or prices (Fdg. 43).

Since 1945 the percentage of yearly total standard coupler business done by each of the appellee manufacturers has varied widely (Jur. Stmt., App. A, 36), with the smaller non-patent owning manufacturers having consistently increased their business at the expense of the large patent

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[4] Appellant's Jurisdictional Statement refers repeatedly to "the standard coupler," apparently in an endeavor to create the impression that the same coupler has been standard from 1916 to date. In fact, increased service requirements have necessitated continuous improvements in standard coupler design. Since 1916, four different coupler designs have been adopted by the railroads as standard or alternate standard. (Fdgs. 6, 40).

owning manufacturers (Jur. Stmt., App. A, 62). And this has occurred notwithstanding the fact that since 1945 each appellee manufacturer "has had surplus and unused capacity for the production of standard couplers and standard coupler parts" (Fdg. 70). "Each [of the appellee manufacturers] fights for every customer and every sale . . . the industry is one of ceaseless competition." (Jur. Stmt., App. A, 40-41).

This competition prevails in an industry with limited prospects (Jur. Stmt. App. A, 41):

> "To increase one's business in this industry does not mean one creates business which did not exist before. It means you must take it away from somebody else. There is only 100 percent of the business and it is limited to railroads only, and no salesman creates any new prospects. Sales ability constructs no new railroads. You have to fight for what there is."

In such a vigorously competitive market the prices of an identical product to a limited number of "customers represented by astute purchasing agents" (Jur. Stmt. App. A, 41) had to be uniform:

> "Mr. Suttie of American Steel Foundries said he had to follow National's prices because the parts were all to exactly the same specifications and of the same standard quality so that no railroad would pay any other price for the same identical thing. The only difference was the imprint, the name plate on the parts." (Jur. Stmt., App. A. 46)

Appellee National Malleable was the largest manufacturer of standard couplers, and no other manufacturer could make the coupler "any cheaper". (Jur. Stmt. App. A, 44). The Trial Judge recognized the obvious business dictate that the smaller companies "couldn't charge more for the same exact thing and get the business at all; that

they couldn't charge less and get the business because National would have to meet their competition if they did so." (Jur. Stmt., App. A, 43).

And the customers constitute ". . . an industry which is in a condition of contraction." (Jur. Stmt., App. A, 55). As established by appellant's own evidence, the number of all freight-carrying cars decreased by over 54,000 cars in the five-year period between 1951 and 1955 alone. (Pltf's. Exh. 1200-1827).

As the Trial Judge observed, the coupler industry today does not have (Jur. Stmt., App. A, 56):

> ". . . what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and its future is comparatively dismal alongside of the investment opportunities in the ventures which entice America today, such as in the electronic and nuclear fields . . . As a matter of circumstantial evidence it is far more probable that venture capital stays out of this business because it doesn't want to get in rather than it is kept out by unlawful combination. I find that nobody of the industry here decided to keep anybody out. The ones on the outside never evidenced any desire to get in . . . The reason why they wouldn't are very apparent and those reasons are not the result of any illegality."

Under such conditions appellant was unable to point to "anybody in particular who" within the last twenty years "desired to actually get into this business and who had the competency to get in the business, who was kept out." (Jur. Stmt., App. A, 53)

It was a record such as this which compelled the Trial Judge to reject the inferences of illegality sought by appellant and, in the exercise of his discretion, to refuse to issue the injunctive relief prayed for by appellant.

ARGUMENT

I.

IN THE ABSENCE OF A STRONG SHOWING OF ABUSE OF DISCRETION THE TRIAL COURT'S REFUSAL TO EXERCISE ITS EQUITY POWERS TO GRANT INJUNCTIVE RELIEF SHOULD BE AFFIRMED.

This Court, in *United States v. W. T. Grant Co.*, 345 U. S. 629, 633, unequivocally stated the rule applicable here:

> "The purpose of an injunction is to prevent future violations, *Swift & Co. v. United States*, 276 U. S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. *But the moving party must satisfy the court that relief is needed.* The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. *The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it.* To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

Moreover, ". . . the Government must demonstrate that there was no reasonable basis for the District Judge's decision." (345 U. S. at 634).

It is not enough for appellant here to urge that different inferences might have been made by the trier of the facts. As this Court declared in *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-2:

> *"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* If defendants' witnesses spoke the truth, the findings

are admittedly justified. *The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.*

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. *There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive and design.* While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'."

To the same effect are *Hecht Company v. Bowles,* 321 U. S. 321, 329; *United States v. Oregon State Medical Society,* 343 U. S. 326, 333.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE INFERENCE OF AN INTENT TO MONOPOLIZE BY APPELLEE MANUFACTURERS, URGED BY APPELLANT UPON CIRCUMSTANTIAL EVIDENCE ALONE.

Appellant's first alleged "substantial" question (Jur. Stmt., 16, 17) relates to alleged monopolization of standard couplers and parts since 1945. Appellant recognizes that to establish its case it had to prove that *presently* the appellees had "both the power to monopolize, and the intent to monopolize." (Jur. Stmt., 17; *American Tobacco Co. v. United States,* 328 U. S. 781, 811). In attacking the Trial

Judge's decision, appellant has confined its Jurisdictional Statement principally to attempting to show the *"power"* of appellees to monopolize, based on the Standard Coupler Agreement of 1916, ownership by two of the appellees of patents relating to standard couplers, and control of standard coupler drawings and gauges. In so doing, appellant endeavors to gloss over the Trial Judge's determination, predicated upon the *subjective* issue of the general *intent* of the appellee manufacturers, that there was no present threat of monopolization requiring injunctive relief.

A. THE TRIAL COURT PROPERLY CONSIDERED THAT, SINCE THIS WAS AN ACTION FOR INJUNCTIVE RELIEF, IT WAS INCUMBENT UPON APPELLANT TO ESTABLISH THAT THERE WAS A PRESENTLY EXISTING VIOLATION OF LAW BY APPELLEES WHICH, IF NOT RESTRAINED BY INJUNCTION, WOULD CONTINUE.

Appellant devotes considerable of its Jurisdictional Statement to a description of the terms and operations of the so-called Standard Coupler Agreement of 1916 which, however, was admittedly terminated as of December 31, 1944.

The Trial Judge gave consideration to the some thirty years of history that preceded the cancellation of the Standard Coupler Agreement of 1916. He recognized, however, that the issue before him was immediate, and that the equitable relief requested by the appellant should not be granted unless necessary to forestall present or probable future violations (Jur. Stmt., App. A, 31-2, 66):

> "Since this is an injunction case, we might well have limited the evidence to that which has happened since December of 1944, because a 13-year period ought to have been sufficient to prove a current conspiracy, if one exists, but we have permitted the plaintiff to go back beyond the Trust Agreement of 1916 which was dissolved in December, 1944, and into some events of decades previous to that, for the purposes of showing plaintiff's claims as to the motivations, alleged illegali-

ties, the intentions with which certain wrongs were done, habit patterns, etc., all with a view to throwing light on the current situation which plaintiff claims is here susceptible of injunction and concerning which plaintiff claims that the people of these United States cannot be otherwise protected from this 40- to 60-year-old illegal combination.

* * *

"If there has been violation in the past, and I am really not called upon to find there has or has not been up to 1945, there is surely no cognizable danger of its recurrence today, thirteen years thereafter. Whether or not there has been a violation in the past, my question here is as to whether or not injunction is required today to forestall future violations."

The termination of the Standard Coupler Agreement of 1916 in 1945 resulted, as the Trial Judge found (Fdg. 42), in "*substantial changes which have continued to the present time* in the method by which each of the defendant manufacturers conducted its business" including six specific changes, i.e. (1) no business quotas have been allocated; (2) there has been no fixing of prices; (3) there has been no agreement or understanding among the defendant manufacturers with respect to the issuance of licenses under patents covering features embodied in the standard coupler; (4) there has been no agreement or understanding among any of the defendant manufacturers to allocate customers; (5) competition among them to obtain the maximum possible business has resulted in "a veritable cat and dog fight, wherein each has tried to get all the business away from the others that it can"; and (6) the smaller coupler manufacturers have consistently increased their business at the expense of the larger manufacturers.

In denying relief the Trial Judge was, of course, heeding the admonition of this Court in *United States v. Oregon State Medical Society*, 343 U. S. 326, 333:

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. *The sole function of an action for injunction is to forestall future violations.* • • • All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. • • • Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue."

Appellant recognizes that in this case proof of any *present intent* to monopolize by the appellee manufacturers must be established by inference only. Appellant offered no direct evidence of such intent, or of such monopolization. It was primarily from "The fact that no newcomer has entered the industry during a 40-year period . . ." (Jur. Stmt. 17; App. A, 53) that appellant asked the Trial Court to *infer a present intent* to monopolize by the appellee manufacturers.

The Trial Judge not only decided that this was not a valid inference to be drawn from the evidence, but also concluded that the evidence affirmatively established a lack of intent to monopolize on the part of the appellee manufacturers. In arriving at this conclusion, he considered the evidence, which appellant would have this Court ignore, of (1) the lack of any real applicants, since 1945, for entry into the coupler industry, and the declining market for railroad couplers; (2) the intense competition among the present coupler manufacturers, including the non-patent owning smaller manufacturers; and (3) the statements of the responsible officials of the patent-owning appellees of their willingness to give consideration to any qualified applicant for a license to manufacture standard couplers.

B. APPELLANT WAS UNABLE TO SHOW ANY REAL APPLICANTS SINCE 1945 FOR ENTRY INTO THE COUPLER INDUSTRY, AND THE TRIAL COURT ACCEPTED, AS A MORE REASONABLE EXPLANATION OF THE LACK OF ANY NEW COMPETITION IN THE INDUSTRY, THE CONTRACTING AND DECLINING NATURE OF THE RAILROAD SUPPLY BUSINESS, RATHER THAN THE MONOPOLY CONSPIRACY INFERENCE ASSERTED BY APPELLANT.

The District Judge examined (Jur. Stmt. App. A, 53-54) appellant's contention that there were "real applicants" for entry into the standard coupler industry, and found the evidence to be to the contrary. One applicant had no intention to get in "and so stated"; another was looking for an "angel"; the third said "they were only 'toying' with the idea", and "never asked for a license"; and the last was told how to get information it requested, but "was never heard from again".

Moreover, there is nothing in the record to support the assertion made by appellant (Jur. Stmt. 3) that the Mechanical Committee "had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts. . ." Appellant was unable to show any instance in the last ten years in which any person or manufacturer, interested in standard coupler manufacture, had even requested that drawings be supplied (Fdg. 76). And furthermore, the Trial Judge found (Fdg. 36) that supervision over distribution of standard coupler drawings is required for public safety.

The Trial Judge's common sense analysis bears repetition here (Jur. Stmt. App. A, 47, 48):

> "As to the Mechanical Committee's holding its own drawings and gages and the claim of their denying others access thereto, I do believe that whatever was done in this respect was done in the interest of standardization and in the interest of protecting standardization and in the interest of the safety of passengers and crews on trains.

"I agree that standardization is necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work that others may ride.

• • •

"Just what must manufacturers do to keep within the law? Must they go around with their drawings in their hand offering them to those who might possibly be enticed into becoming their competitors? Is it wrong to create something and to possess it and to wait for someone who did none of the work to ask for it? And if you want something that belongs to somebody else, because he put it all together, and you didn't put any of it together, were we not told long ago to 'ask and we shall receive'? And whether one's hat is in his hand or not, it seems to me it is more just to tell one man to go through the red tape of speaking up for himself than it is to make a criminal out of one who didn't give up his possession because a prospective manufacturer who doesn't yet exist—according to the testimony in the case to date—has coveted his neighbor's goods and is willing to take them but is not willing to go through the indignity of asking for them."

Recognizing appellant's claim to be that "since no new competitors have come into the business . . . they have therefore been kept out," (Jur. Stmt. App. A, 53), the Trial Judge refused to accept such an unsupported inference, and pointed to the unchallenged economic fact, that "the railroads are in an industry which is in a condition of contraction . . . it is equally a matter of common knowledge that capital of the size required here seeks to enter businesses which have a fair chance to both profit and expand . . . I do believe that no part of the railroad business today has what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and

its future is comparatively dismal . . ." (Jur. Stmt. App. A, 55-56).

The Trial Judge found, based on the uncontroverted evidence, that "to equip a foundry, already established and equipped to produce steel castings, to produce only the standard types E, H and F couplers and parts therefor would cost in excess of Nine Hundred Thousand Dollars" (Fdg. 72); and that since January 1, 1945 no manufacturer other than the defendants, "after investigation of the business has sought to invest venture capital to manufacture and sell standard couplers or standard coupler parts, *and because of the economic factors prevailing in the business there is no probability that any new manufacturer will desire so to do in the future*" (Fdg. 73).

"The fact that since January 1, 1945, no manufacturer other than defendant manufacturers has entered the business of manufacturing standard couplers or standard coupler parts in the United States has resulted from economic forces beyond the control of defendant manufacturers, and not from their conduct either before or after January 1, 1945" (Fdg. 78).

On this proof, that the industry was in a "condition of contraction" so that "venture capital would be too intelligent to get in," the Trial Court concluded that "Plaintiff here says others are improperly kept out of this business. The defendants have proved nobody wants in." (Jur. Stmt. App. A, 55).

C. THE UNCONTROVERTED EVIDENCE ESTABLISHED THE INTENSE COMPETITION EXISTING IN THE RAILROAD COUPLER INDUSTRY TODAY AND THE ABSENCE OF ANY ECONOMIC SANCTIONS BY THE LARGER PATENT OWNING COMPANIES AGAINST THEIR SMALLER NON-PATENT OWNING COMPETITORS.

Of special significance to the Trial Judge in determining whether or not the appellee manufacturers had any intent to monopolize was the uncontroverted evidence of the

intense competition among these manufacturers of railroad couplers. In the District Judge's own language (Jur. Stmt. App. A, 36-8):

> " . . . in 1948 National had 42½ percent of all business in E couplers, new equipment, repair and maintenance sales, and in June, 1957, they were down to 35 percent of all business. This is a terrific drop because that 7½ percent loss of the total of all business done by all constitutes a reduction in National's own business of a little more than a 19 percent loss of National's own business. And Symington-Gould and American Steel Foundries gained nearly all of National's loss.
>
> . . .
>
> "Every defendant is out to get all the business he can get. They have all so sworn, and the mathematical certainties prove it."

Appellee Buckeye, prior to 1944, sold only 13.41 per cent of coupler knuckles, but by 1957 it was selling 42.5 per cent. (Jur. Stmt. App. A, 36.)

Equally persuasive to the Trial Judge in determining whether the appellee manufacturers had any present or future intent to monopolize so as to justify equitable relief was the fact that the smaller of the appellee manufacturers, holding no patents on the standard E freight car coupler, had nevertheless vigorously competed since 1945 and had expanded their businesses at the expense of the larger patent-owning appellees, without any economic pressure and without any threat of a refusal to have their licenses renewed.

As an example, the Court referred to the situation of the appellee Buckeye Steel Castings Co. (Jur. Stmt. App. A, 60-1):

> "We find that Buckeye holds no patent here whatsoever. It operates on licenses from someone else to

make what they have patented. The royalties are so nominal that a non-owner is at no disadvantage whatsoever. Royalties are never equal to one-half of one percent of the selling price, so the owners have taken no advantage whatsoever of the non-owners.

"The Government has here suggested that the method followed in the renewal of licenses is a factor of what they consider a conspiracy herein. The success of Buckeye since 1945 disproves the claim. Holding no patents, operating on licenses from others, receiving them without asking for them as they have testified, they give the patent owners the biggest competitive headache they get."

Indeed, as showing the intensely competitive atmosphere in this industry, the Court singled out exhibits showing the increase in customers of appellee Buckeye (Jur. Stmt. App. A, 40):

"Buckeye's Exhibit 383 shows that after the 1944 dissolution Buckeye went out and gained 138 new customers and, at the same time, lost 37 of their old customers. Therefore they have a net gain of 101 customers when there were only 270 possible customers to solicit. In other words, they got more than one-third of all customers from all sources, which were also sources for the other defendants. This proves the fallacy of the claim that there is no competition here."

" . . . little Symington-Gould had 18.23 percent of all coupler business in 1954, and ASF, a big one [and one of the two appellees owning patents on the standard E coupler] had 16.59." (Jur. Stmt. App. A, 62)

Appellee McConway & Torley, another small, non-patent owner, which had only 10% of the market before 1945, had "in the following years immediately thereafter, 16 percent, 12.51, 13.78, 13.89, 15.94, and so on." (Jur. Stmt. App. A, 35)

D. THE RESPONSIBLE OFFICIALS OF APPELLEES OWNING PATENTS ON FEATURES OF THE STANDARD RAILROAD COUPLER STATED THEIR WILLINGNESS TO GIVE CONSIDERATION TO ANY QUALIFIED APPLICANT FOR A LICENSE.

Appellant recognizes that appellee National Malleable's Vice-President in charge of issuing patent licenses "testified that there was no agreement which prevented him from issuing licenses to any qualified applicant (Tr. 1923), and that it was his company's policy to give 'serious consideration' to any license application from any qualified applicant." (Jur. Stmt., 14). There was similar testimony by a Vice-President of appellee American Steel Foundries, the only other appellee owning patents on the present standard E freight coupler (Tr. 1332-1334).

Appellant's only criticism of this testimony and of the Trial Court's acceptance of it is that no witness testified that "any defendant would license every qualified applicant." (Jur. Stmt., 14).

A charge of abuse of discretion on the part of a Federal Judge cannot be predicated upon such language refinements. The Trial Judge accepted this testimony as evidencing a "licensing policy . . . fair to all" (Jur. Stmt., App. A, 53) in view of appellant's failure to show a single instance in over twenty years in which any serious applicant for a license had been refused, and in view of the evidence that existing manufacturers without patents had successfully, without any economic reprisals, obtained increasingly more business than the larger manufacturers owning patents, and in an industry that was contracting, not expanding.

E. THE TRIAL COURT PROPERLY RULED THAT NO INFERENCE OF PRESENT INTENT TO MONOPOLIZE BY THE APPELLEE MANUFACTURERS COULD BE PREDICATED ON THE STANDARD COUPLER AGREEMENT OF 1916, TERMINATED IN 1945.

Ignoring the current situation in the railroad coupler industry, appellant devotes considerable of its Jurisdictional

Statement to the so-called Standard Coupler Agreement of 1916, admittedly terminated as of December 31, 1944. Appellant characterizes this agreement as a licensing of "pooled patents", and contends that the Trial Court "plainly erred" in finding that this agreement "did not unreasonably restrain or monopolize trade or commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights." (Jur. Stmt. 16).

The Trial Judge considered that he was "really not called upon to find there has or has not been up to 1945" any violation of the Sherman Antitrust Act (Jur. Stmt. App. A, 66). Nevertheless, since appellant had urged so insistently that the Standard Coupler Agreement of 1916 was illegal, the Trial Judge considered this issue and concluded that, "As to the Trust Agreement of 1916, as of the date it was made I see no illegality in it then, and since 1945 no court has ever found it to be illegal. Nor do I." (Jur. Stmt. App. A, 32).

Appellant's assertion of the illegality of the 1916 Agreement overlooks two controlling factors, which distinguish the Standard Coupler Agreement from the "patent pooling" arrangements condemned in the authorities relied on by appellant (Jur. Stmt. 16). These factors, which were clearly before the Trial Judge, and on which his finding that the 1916 agreement "did not unreasonably restrain or monopolize trade or commerce" (Fdg. 25) is based, are:

(1) The concededly chaotic situation (Jur. Stmt. 6-7) in which the railroads and the coupler industry found themselves in the early 1900's, and the remedial effect of the adoption of the standard D coupler, hailed as "epoch-making" by the Interstate Commerce Commission in 1916 (Fdgs. 15, 19 and 20);

(2) The limitation of the interchange of patent rights provided for in the Standard Coupler Agreement of 1916

to what was necessary to eliminate the "great diversity of couplers . . . which endangered train operation and operating crews" (Jur. Stmt. 7), and to assure the development and continuity of standard couplers. The 1916 standard D coupler embodied features covered by thirteen patents, owned by three of the then existing coupler manufacturers. Without rights under all of these complementary patents the D coupler could not be manufactured free from claims of infringement (Fdg. 23). The patent owners granted to the Board of Trustees rights under *only* those patents covering features which became embodied in the couplers adopted as standard, and furthermore, such rights, and the licenses granted by the Board, were limited to "utilization in said standard form of coupler, but not otherwise."

As stated by the Trial Judge (Jur. Stmt. App. A, 33):

> "What these manufacturers did before 1916 was unique in the history of patents and inventions. For the benefit of the entire country they so gave up their exclusive rights for the use of each other as to make it possible for the development of their ultimate mechanical masterpiece.
>
> "If they didn't have this team-work for the benefit of our people, they might still be fighting over patent differences, and we might never have perfected a standard interchangeable coupler."

Counsel for appellee National Malleable and for appellee American Steel Foundries advised their clients to enter into the 1916 agreement, because ". . . this coupler situation is one which makes the standard coupler agreement a peculiarly reasonable one," (Joint Memorandum by Charles Neave and C. C. Linthicum, Deft. N.M. Exh. 98, p. 5).

An important industry conducted business in this country under the 1916 agreement for thirty years, without challenge by the United States. The earliest of the authorities relied on by appellant (Jur. Stmt. 16) to condemn the Standard Coupler Agreement is the 1948 decision of this Court in *United States v. Line Material Co.*, 333 U.S. 287, handed down three years after the Standard Coupler Agreement was cancelled. Each of the authorities relied on by appellant is distinguishable from the Standard Coupler situation, and, furthermore, reliance by appellant on them emphasizes the sound judgment which dictated the cancellation of the 1916 agreement in 1945, prior to any of these decisions, "as a result of growing apprehension on the part of the defendant manufacturers and their counsel with respect to interpretation of the antitrust laws." (Fdg. 41).

As the Trial Judge pointed out, the legality of the 1916 agreement is, however, in no sense controlling here. Appellant in effect concedes this when it says that the "basic question presented by the appeal" is "whether the defendants abandoned" those allegedly illegal practices when, in 1945, "they formally abrogated the 1916 agreement." (Jur. Stmt. 16).

The drastic changes in the railroad coupler industry following 1944, considered by the Trial Judge as a complete abandonment of any prior practices, have already been discussed above. On this record the Trial Judge's conclusion, in determining whether or not to exercise his "Chancellor's discretion" to issue an injunction, that "I see no such monopoly going on today. I see no cognizable danger of recurrent violation here" (Jur. Stmt., App. A, 66), cannot be seriously attacked as an abuse of that discretion.

III

IN THE LIGHT OF THE UNCONTROVERTED ORAL TESTIMONY OF THE RESPONSIBLE OFFICERS OF EACH OF THE APPELLEE MANUFACTURERS THAT THERE IS NO AGREEMENT OR CONSPIRACY TO FIX PRICES, THE TRIAL COURT'S REFUSAL TO ADOPT THE INFERENCE OF PRICE FIXING URGED BY APPELLANT FROM MERE UNIFORMITY OF PRICES AND PRICE LEADERSHIP IN AN INDUSTRY MANUFACTURING AND SELLING AN IDENTICAL PRODUCT TO A LIMITED NUMBER OF CUSTOMERS IS NOT AN ABUSE OF DISCRETION.

Appellant's second alleged "substantial" question (Jur. Stmt. 18, 19) relates to an alleged price fixing conspiracy by appellee manufacturers. It has predicated its appeal, as it did its presentation in the lower court, on an inference of illegality arising from price uniformity, allegedly continuing after the cancellation in 1945 of the standard coupler agreement of 1916. Price fixing by agreement through the Standard Coupler Agreement of 1916 and the Board of Trustees was abandoned when that agreement was cancelled in 1945. Accordingly, (contrary to appellant's contentions) there could be no continuation of "the same system of pricing", (Jur. Stmt. 4).

Appellant's real charge is that, since 1945 "The others have consistently adopted National's prices and related freight differentials." (Jur. Stmt. 18).

The Trial Judge, recognizing that National Malleable at all times since 1945, was the largest producer of standard couplers and had the ability to produce standard couplers on a lower cost basis than that of its competitors (Fdg. 49) stated the business necessity of National Malleable's competitors following its prices (Jur. Stmt., App. A, 41):

> "Buckeye's counsel says they followed National prices; that they are constrained to do so because

couplers are exactly alike and completely interchangeable and fungible. All must go to the same small group of customers represented by astute purchasing agents. They know a small company can't get more money for the same thing than a large one. They followed National's prices but couldn't learn them until they were published. Moriarty never told them until he told the world. That was the plaintiff's proof, and I believe it, and I find that the parallelism of action here which plaintiff construes as constituting proof of an implied conspiracy here is really the result of a strong and informed competition."

The other appellee manufacturers perforce followed National Malleable's prices within, as well as outside, base territory. National Malleable determined its delivered prices outside base territory by using a freight differential list. It was not difficult for competitors to determine National Malleable's delivered prices. They were often "ascertained by competing defendant manufacturers from customers" (Fdg. 56). National Malleable, therefore, acceded to requests from each of its competitors "from time to time . . . to furnish to it a copy of its freight differential currently in use . . ." (Fdg. 56).

Since general price uniformity in the selling of an identical product is inevitable, competition in the standard coupler industry has been and is conducted generally by other means. Since January 1, 1945, the terms and conditions of sale established from time to time by the defendant manufacturers "have not been uniform, but have been varied by them for competitive purposes as have sales inducements utilized by various ones of them. Defendant manufacturers from time to time have deviated from the published prices set forth in their price lists for both standard couplers and standard coupler parts and yokes to meet competitive conditions" (Fdg. 59).

The Trial Judge was called upon to balance the inferences sought by appellant against the oral testimony of the responsible officers of the appellee manufacturers, each of whom categorically denied any price fixing agreements or conspiracies. "To the sophistication and sagacity of the Trial Judge the law confides the duty of appraisal", of witnesses, *United States v. Oregon State Medical Society*, 343 U. S. 326, 339. The Trial Judge made this appraisal in no uncertain terms (Jur. Stmt., App. A, 42-5):

> "Now, there were some animate witnesses on price-fixing, too, and all animate witnesses testified there was never a conspiracy or combination here or any agreement to fix prices.
>
> "It may be ever natural for the accused to deny a charge against him; it may even accord with their instinct of self-defense. We have all observed that as lawyers. But it seems to me these were intelligent, educated, honorable professional men, these were men to whom dishonesty in a court room would be as alien as a deliberately false reading from one of their own slide rules. To me they tell a completely honest story of their businesses, and of the events with which we are here concerned.
>
> • • •
>
> "I believe the testimony of the men who said they fight for business because the business in its ups and downs, from these exhibits, proves exactly what they say.
>
> "Now Emerson once said that 'what you are talks louder than anything you can say.' Here the changing course of business, the way some take business away from others, the way sales go up and sales go down, the graphs which prove the degree of change, all of this talks louder and more convincingly to the effect that there is a healthy competition here and everybody is getting all the sales he can.

> "These facts and this evidence in exhibit form talk louder against the theory of illegal combination than do the suspicions of plaintiff's counsel or any contrary evidence which plaintiff has produced."

The Trial Court accepted the undisputed sworn testimony of the responsible officials of appellee manufacturers, that in the exercise of their own proper business judgment they followed the prices of National Malleable. This Court has specifically held that such action is *not* a violation of the Sherman Antitrust Act. Thus, it said, in *United States v. International Harvester Company*, 274 U. S. 693, 708-709:

> "And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

To the same effect are *United States v. United States Steel Corporation*, 251 U. S. 417, 448, 449; *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, 606; and *Cole v. Hughes Tool Co.*, 215 Fed. 2d 924 (10th. Cir., 1954), cert. den. 348 U. S. 927.

Appellant would have this Court ignore the oral testimony accepted by the Trial Judge, substitute appellant's inference of price fixing from circumstances so firmly rejected by the Trial Judge, and thereupon predicate an abuse of discretion. There is no authority for such a sweeping rejection of a Trial Judge's primary responsibility by an appellate court.

Appellant contends that a "substantial question" is presented on the facts of this case which requires distinguishing between principles applied by this Court in *United States v. Masonite Corp.*, 316 U. S. 265, and *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, on the one hand, and those found controlling in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537,

on the other, as a guide in administration and enforcement of the Sherman Act. *Masonite*, as quoted by appellant, was a case of the " 'fixing of prices by one member of a group, pursuant to *express* delegation, acquiescence or understanding . . .' " (Jur. Stmt., 18-19), as was *Interstate Circuit*, 306 U. S. 208, 216.

This is not, however, the case appellant presented to the Trial Court. There it conceded in its closing arguments to the Court that, because "the other defendants were consistently following National as price leader . . . the plaintiff contends that this as a matter of law *implies* an agreement to follow National's price. . ." (Tr. 2568). Appellant's counsel conceded that "there was no *expressed* agreement" (Tr. 2571) by any of the appellee manufacturers to follow National's price leadership, and recognized that "the plaintiff must admit there was no direct evidence in this case that National advised any other defendant what they were going to do about prices" (Tr. 2574).

Both *Masonite* and *Interstate Circuit* involved formal "invitations" to competitors to follow the pricing policy of the inviter, individually accepted in fact by such competitors, with knowledge of the acceptance by all others. The necessary announcement of prices to the trade, even when followed by others, cannot be considered any such "invitation" to an illegal conspiracy.

In *Theatre Enterprises*, on the other hand, the court held that mere common knowledge of each defendant that all were following the same business practice did not establish a conspiracy. There the Court stated (346 U. S. at p. 541):

> ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."

There is no evidence in the record of the "tacit delegation", whatever that means, which appellant claims the

other manufacturers made to National Malleable of the duty of fixing prices to be blindly followed. Appellant apparently tries to fill this gap by its reference to an isolated instance when "National did considerable prior missionary work with customers and competitors prior to shifting, late in 1947, from quotation of firm prices to 'prices in effect at time of delivery' (fngs. 62-63)." (Jur. Stmt. p. 12).[5] The Trial Court found that the expressions of opinion by National Malleable's vice-president here referred to "did not constitute a request or an invitation to competitors to participate in or give adherence to any plan, understanding, agreement or program for the establishing or maintenance of prices on standard couplers" (Fdg. 63). In fact, although National Malleable's competitors independently (Fdg. 64) followed and adopted the "policy of pricing couplers at prices in effect at the time of delivery" in 1947 (Fdg. 62) National Malleable was later forced by competitive conditions to return to the system of quoting prices firm at time of order or sale (Deft. N. M. Exhs. 273, 274, 275).

This case, therefore, does not lie between *Masonite* and *Interstate Circuit* and *Theatre Enterprises*, as appellant contends, but instead is squarely within *Theatre Enterprises*. Accordingly, a decision in this case would not delineate between the two principles of those cases.

CONCLUSION

There is here no substantial legal question whatever of public importance essential to proper administration of the antitrust laws, but simply appellant's final effort to secure further review of a lengthy trial record of cumbersome size

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[5] Examination of these findings demonstrates that appellant's implication, from the term "missionary work", that the District Court found that National Malleable issued an "invitation" to the other defendant manufacturers to participate in a changed pricing plan misstates the findings.

and scope. The decision below is correct, and this appeal presents no question which requires further briefing or argument.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX I

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. 30281

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, THE SYMINGTON-GOULD CORPORATION, MCCONWAY & TORLEY CORPORATION, FOUNDRIES EXPORT CO., INC., AND ASSOCIATION OF AMERICAN RAILROADS, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, hereby finds the facts specially and states separately its conclusions of law herein as follows:

FINDINGS OF FACT

1. This is a suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, commonly known as the Sherman Act, to prevent and restrain alleged continuing violations of Sections 1 and 2 of that Act (15 U. S. C. Secs. 1, 2 and 4).

2. The defendants, National Malleable and Steel Castings Company, (hereinafter called "National Malleable"); American Steel Foundries, (hereinafter called "American"); The Buckeye Steel Castings Company, (hereinafter called "Buckeye"); McConway & Torley Corporation, (hereinafter called "McConway"), and The Symington-Gould Corporation, (hereinafter referred to collectively as the "defendant manufacturers"), have been engaged in the business of manufacturing railroad couplers and yokes

since some time before the year 1912. The defendant The Symington-Gould Corporation, (hereinafter called "S-G"), was formed October 28, 1936, by the merger of The Symington Company and The Gould Coupler Company, (hereinafter referred to as "Gould"). The Symington Company was not a manufacturer of railroad couplers, but Gould had been a manufacturer of such couplers from some time prior to 1912 until the time of the merger. Since the merger of The Symington Company and Gould, S-G has continuously been engaged in the manufacture of railroad couplers.

3. The Association of American Railroads (hereinafter called the "AAR") is a voluntary unincorporated association of the principal railroads of the United States, Canada and Mexico, with its principal office in Washington, D. C. It was formed on October 12, 1934 as successor to the American Railway Association, which was established following reorganization of the American Railroad Association (after October 1, 1920). The latter in turn was organized in 1919 under authority of a directive of the United States Railroad Administration, during the World War I period of Government operation. The Mechanical Division of American Railway Association and its predecessor had resulted from contemporaneous amalgamation of the American Railway Master Mechanics' Association and the Master Car Builders Association (herein called the "MCB"). To facilitate the free interchange of cars among different railroads and the repair of such cars, the MCB had from 1867 until 1918 promulgated standards of car construction. Neither AAR nor any predecessor of AAR has manufactured or sold couplers or coupler parts. Individual railroads which are members of AAR purchase couplers and parts for use on cars which they own and for repair or replacement on cars operated over their lines but owned by others.

4. One of the six departments of AAR is the Operations and Maintenance Department, the head of which is a Vice President of AAR. One of the six divisions in that department is the Mechanical Division. The Mechanical Division serves the mechanical departments of AAR member roads in matters of general interest to the member roads. The activities of the Mechanical Division are carried on through committees under the general supervision of the General Committee of the Mechanical Division. There are approximately twenty-one subordinate committees. One of those committees is the Committee on Couplers and Draft Gears. The members of the Committee on Couplers and Draft Gears are appointed by the General Committee and consist exclusively of mechanical officers of various member roads. A staff of employees of AAR perform administrative work for the committees of the Mechanical Division, but no employee of AAR is or has been a member of the General Committee or of the Committee on Couplers and Draft Gears or has had any right to vote on matters considered by those committees.

5. One of the functions of the Mechanical Division is and has been the adoption of various standards (including alternate standards) for railroad car construction and for the numerous component parts of railroad cars, including couplers and yokes. Those standards are known and usually referred to in the railroad industry as AAR standards.

6. The railroad car couplers involved in this case are devices attached at each end of a railroad car or of a railroad locomotive for the purpose of connecting or coupling cars with one another and cars with locomotives. The couplers here involved are so-called knuckle type couplers, and the standard and alternate standard couplers are made up of the following basic parts: coupler body, including head and shank, knuckle, lock, knuckle thrower, lock lift assembly and knuckle pin. Standard and alternate standard couplers are those couplers adopted as such from

time to time by the member railroads of the AAR or its predecessors.

7. A "yoke" is a steel casting to which the shank of the coupler is connected. The yoke is supported on the underframe of a railway car or locomotive and surrounds the shock-absorbing mechanism usually called a draft gear. There are at least ten manufacturers, including the five defendant manufacturers, of the Y-40 yoke, generally used with the D and E couplers, the principal freight car couplers. The defendant manufacturers are the only manufacturers of swivel yokes and yokes designed for use with the standard F and H couplers.

8. The design and specifications of standard couplers and yokes and proposed improvements or changes therein are considered by the Committee on Couplers and Draft Gears, and, after testing has been completed to the satisfaction of that Committee, recommendation is made by it to the Mechanical Division at its annual meeting, where the recommendation is open for discussion by the membership as a whole. A vote is then taken as to whether the recommendation should be submitted to the membership in the form of a Letter Ballot. When such a ballot is taken, member roads voting in the negative are requested to state the reasons for such vote, for the further guidance of the committee or committees affected. Adoption of such recommendations requires a majority vote based on car ownership. Such Letter Ballot procedure is followed not only with respect to the adoption of distinct types of couplers as standard, but also with respect to modifications to any standard type except that modifications deemed by the AAR Committee on Couplers and Draft Gears to be of a minor or editorial nature are as a matter of practice sometimes approved by the AAR Committee on Couplers and Draft Gears without submission to Letter Ballot.

9. Each railroad has the independent right to purchase and use any kind of couplers or coupler parts that it may

desire, regardless of whether such articles meet or do not meet the AAR standards, subject only to the safety requirements of laws of the United States and of the several states.

10. In actual practice, member roads of the AAR have exercised their right of individual choice by purchasing and using from time to time articles of car construction different from standards of AAR and its predecessors, including non-standard couplers and coupler parts. There has been and is no agreement or understanding between the AAR or its predecessors and the defendant manufacturers, or between the AAR or its predecessors and member roads either (a) that member roads will purchase and use only standard couplers and parts or (b) that member roads will not purchase or use couplers or coupler parts manufactured by persons or corporations other than the defendant manufacturers.

11. Railroads and non-railroad owners of freight and passenger cars, including certain departments and agencies of the United States of America, have entered into an Interchange Agreement by which they subscribe to Interchange Rules adopted by the member railroads and promulgated by the AAR. The Interchange Rules provide for the inspection, maintenance and repair of cars operated over the line of a railroad which does not own those cars. The Interchange Rules require connecting carriers to accept cars tendered in interchange if equipped as provided in the rules. Cars equipped with non-standard couplers may be refused in interchange, but refusal is not required.

12. Many railroads, members of AAR and its predecessors, have interchanged cars with equipment of various kinds differing from the equipment specified in the Interchange Rules, including non-standard couplers and non-standard parts.

13. Most passenger cars and substantial numbers of freight cars are operated only over the lines of their owners. They are not interchanged and therefore are not sub-

ject to the Interchange Rules, but most passenger cars and virtually all freight cars are nevertheless equipped with standard couplers.

14. As a result of the losses of life and limb suffered by railroad employees, due to the service inadequacy and multiplicity of designs of railroad couplers, Congress, in The Safety Appliance Act of 1893, forbade any railroad after January 1, 1898 to use in interstate commerce any car not equipped "with couplers, coupling automatically by impact and which can be uncoupled without the necessity of the men going between the ends of the cars". (27 Stat. 531, 45 U. S. C. 2.)

15. Even after the adoption of tne Safety Appliance Act of 1893, cars used on American railroads continued to be equipped with a great diversity of couplers which, though they met the technical requirements of the Statute, were deemed by the railroads themselves unsatisfactory to meet their overall operating requirements for the reasons, among others, that:

(a) The couplers differed in strength, operating characteristics, numbers and location of parts, methods and plans of construction, and service performance;

(b) Maintenance of cars so as to permit their free interchange from one railroad to another required the railroads to maintain large inventories of repair parts applicable to each of the many different types of couplers then in service; and

(c) Diversity of coupler types frequently resulted in improper installation of parts, with consequent danger to train operation and the men responsible therefor.

16. In 1904 the MCB first considered ways and means of adopting a standard coupler. In 1912 a special committee appointed by the MCB requested all of the then existing coupler manufacturers, namely, American, National Malleable, Buckeye, Gould, McConway and Monarch Steel

Castings Company (which later went out of existence, and whose assets were acquired by National Malleable in 1920) to participate with the MCB Committee in developing a standard coupler.

17. In response to the request of the railroads made through the MCB, the coupler manufacturers acknowledged the desirability, from a railroad operating standpoint, of coupler standardization, and expressed a willingness to cooperate in achieving standardization if some reasonable plan could be developed by them which would fairly protect their business rights.

18. Experimental couplers were submitted in 1912 and 1913 by the coupler manufacturers to the Standing Committee on Couplers and Draft Equipment of the MCB for its consideration as possible standard couplers. Following extensive tests of such couplers conducted under the supervision of that Committee, the "D" coupler was adopted in 1916 as standard by Letter Ballot of the MCB.

19. The Interstate Commerce Commission recognized the desirability of standardization of couplers and kept itself informed as to progress in the development of the proposed standard coupler. The Commission's Annual Report of 1916 described the adoption of the standard coupler as "an epoch-making step."

20. The standardization of couplers has greatly reduced the number of deaths and injuries from railroad operation. It has also eliminated or minimized the need for maintaining large stocks of repair parts for couplers at various points on the lines of the railroads, thereby benefiting the public through resulting economy to the railroads. Plaintiff concedes, and the Court finds, that the standardization of couplers is necessary, desirable and beneficial.

21. Following consideration of various proposals and arrangements by the coupler manufacturers and their counsel, an agreement known as the Standard Coupler

Agreement of 1916 was executed on October 18, 1916 by National Malleable, American, Buckeye, Gould and Monarch.

22. In essence, the substantial provisions of the Standard Coupler Agreement of 1916 were as follows:

(a) A Board of Trustees was created composed of one representative of each of the parties, to which Board of Trustees each of the parties agreed to grant limited rights under all patents owned by it, covering features which should become embodied in any coupler adopted as standard by the American railroads "for utilization in said standard form of coupler but not otherwise";

(b) The Board of Trustees was authorized to grant non-exclusive licenses to manufacture and sell any coupler which should be made standard by the railroads, including parts therefor;

(c) The Board of Trustees was to specify in such licenses the prices at which the licensee would sell standard couplers and standard coupler parts which within a specified territory (known in this record as "base territory") were to be f.o.b. the coupler manufacturer's works with freight allowed, on complete couplers only, at the carload rate to the nearest point on any railroad or the plant of any car or locomotive builder located in the "base territory", and outside the specified base territory were to be on the same basis except that the f.o.b. price for complete couplers only was higher by an amount computed as required in said agreement (known in this record as a "freight differential").

(d) The Board of Trustees was to specify in such licenses the percentage of the total business, by pieces, in standard couplers, standard coupler bodies, standard coupler knuckles, and standard coupler locks which each of said licensees would

be permitted to obtain in any single year; and to decrease the percentage of any licensee which should exceed the quota so prescribed; and

(e) The quotas specified in the license agreements were to be based on the average percentage of business done by each licensee during the period from 1908 through 1912, and were to be subject to revision on the same basis in the event that additional manufacturers should be licensed.

23. The standard "D" coupler embodied features covered by thirteen United States patents owned by National Malleable, American and Monarch, and rights under all those patents were required to manufacture and sell the standard "D" coupler free from claims of patent infringement.

24. From 1917 through 1924, the Board of Trustees under the Standard Coupler Agreement granted yearly licenses to McConway to manufacture and sell Standard "D" couplers. As of December 14, 1925, McConway became a party to the Standard Coupler Agreement of 1916, and was issued the standard form of non-exclusive license by the Board of Trustees. Neither AAR nor any of its predecessors was ever a party to the Standard Coupler Agreement of 1916, or to any other agreement supplementary or amendatory thereto.

25. The defendant manufacturers in entering into the Standard Coupler Agreement of 1916 had no intent or purpose to unreasonably restrain or to monopolize trade and commerce. That agreement, and the patent license arrangements provided for therein, were reasonable arrangements to accomplish the development and manufacture of standard couplers, did not unreasonably restrain or monopolize trade and commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights.

26. The Standard Coupler Agreement of 1916 contin-

ued in full force and effect until January 1, 1945, when it was cancelled and abrogated.

27. In accordance with the provisions of the Standard Coupler Agreement of 1916 the defendant manufacturers assigned their Canadian standard coupler patent rights to the Board of Trustees and the Board thereupon issued separate Canadian standard coupler licenses to each of the manufacturers. In turn on March 10, 1919, the manufacturers granted to Canadian Steel Foundries a sub-license to manufacture and sell standard couplers in Canada. On April 5, 1920 Canadian Steel Foundries granted a further sub-license to Dominion Foundries and Steel, also a Canadian manufacturer.

28. The quotas of busines in standard couplers and standard coupler parts allocated to each of the defendant manufacturers by the Board of Trustees under the Standard Coupler Agreement were subsequently modified. The last quota agreement was effective from December 31, 1943 until termination of the agreement as of January 1, 1945.

29. The Mechanical Committee of the Standard Coupler Manufacturers was organized in 1918 and continues in existence today. Its membership has been, and is, made up of an engineering representative of each of the defendant manufacturers.

30. The purposes, functions and activities of the Mechanical Committee have been reasonable and useful and of great benefit to the coupler industry, the railroads and the public, and its activities have not unreasonably restrained or monopolized trade and commerce. These purposes, functions and activities have included (1) the study of service requirements and service complaints, (2) the design, development and testing of improvements in existing standards and new standards of couplers and yokes, and making recommendations in connection therewith to the AAR Committee on Couplers and Draft Gears, and

(3) furnishing railroads with information regarding the operation, maintenance and reclamation of such couplers, including the development of reclamation gauges.

31. The Mechanical Committee meets at intervals of several months, and also meets jointly with the Coupler and Draft Gear Committee of the AAR twice each year. Others than representatives of the Standard Coupler Manufacturers have attended meetings of the Mechanical Committee. The joint meetings have been attended by a representative of the Bureau of Safety of the Interstate Commerce Commission.

32. The Mechanical Committee and its members have not been influenced by patent considerations in the design, development and recommendation of new standard couplers, or changes and improvements in existing standard couplers. The criterion on which the Mechanical Committee has based its recommendations to the Coupler and Draft Gear Committee of the AAR is engineering m rit, in order to develop the best possible coupler for th rail-roads. Only nineteen of the seventy-three modifications and improvements incorporated in the standard and alternate standard couplers were patented. Of the forty-nine modifications and improvements so incorporated in the past twenty-five years, only one was patented at the time of its adoption.

33. The Mechanical Committee has no authority with respect to patent matters or with respect to patent licenses. The activities of the Mechanical Committee have not been directed in any respect toward monopolizing the business in standard and alternate standard couplers and parts through the use of patents.

34. With the exception of the passenger car standard couplers, each of the standard and alternate standard couplers consists of a number of unmachined castings. Standard couplers are used in all kinds of weather conditions, and are not protected from rust or other corrosive

effects. Among the engineering problems involved in the design and development of standard couplers are space limitations, manufacturing methods and tolerances, interchangeability and non-interchangeability of parts, strength of the coupler as a whole and relative strength of the parts, simplicity of design, and increasing service requirements. A high degree of engineering skill is required in the design and development of standard couplers and improvements therein, and close engineering supervision is required to maintain the high degree of uniformity required in standard couplers.

35. To insure quality control and interchangeability among couplers and coupler parts manufactured by each of the standard coupler manufacturers, the Mechanical Committee has designed and developed gauges used in the production of standard couplers. The Mechanical Committee also conducts periodic inspections of standard couplers and standard coupler parts manufactured by the various manufacturers. This inspection includes gauging, interchanging of parts produced by the various manufacturers, and physical testing for strength.

36. The Mechanical Committee's control of drawings and gauges used in the manufacture of standard couplers and standard coupler parts is in the interest of standardization and its protection, for the preservation of the safety of passengers and crews on trains, and is necessary to prevent the manufacture of obsolete or inadequate parts which would endanger those who ride and those who work that others may ride. One set of the construction drawings of standard couplers, marked "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" is usually furnished to AAR. Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives. AAR had no right or authority to reproduce or distribute copies of such drawings.

37. AAR and its predecessors have not delegated to the defendant manufacturers or to the Mechanical Committee of the Standard Coupler Manufacturers any responsibilities of AAR. AAR and its predecessors from time to time have requested that a coupler or part be designed by the manufacturers to meet a particular operating need, and have requested that initial drafts of various specifications be prepared, but AAR and its predecessors have at all times reserved to themselves the decision of whether to accept, modify or reject such specifications and to accept, reject or request modifications of such designs, all subject to approval by member roads.

38. The Mechanical Committee has not persuaded, induced or caused the AAR to adopt specifications and requirements for standard couplers and parts, incorporating features claimed in patents and patent applications owned by defendant manufacturers and excluding features claimed under other patents. In all instances, the Mechanical Committee has given careful consideration to proposals and suggestions submitted by others than the defendant manufacturers with respect to changes. Following such consideration, the Mechanical Committee has based its recommendation to the AAR Committee on Couplers and Draft Gears on whether or not the changes under review would constitute an engineering improvement. The AAR Committee has given full consideration to Mechanical Committee recommendations but has always formulated its own independent judgment thereon.

39. AAR and its predecessors, in adopting standards for couplers and coupler parts, have not done so for the purpose of limiting or confining the manufacture of such articles to the defendant manufacturers or to any particular manufacturer or manufacturers or for the purpose of aiding any manufacturer or inventor in obtaining a patent thereon. Such standards have been adopted on the basis of the judgment of the members of the Committee on

Couplers and Draft Gears and the judgment of the individual member railroads as to the mechanical merit, safety and cost of such articles.

40. The service record of the standard "D" coupler was far superior to that of pre-existing knuckle-type couplers. As the speed, length of trains and size of cars increased and additional information as to service performance of the "D" coupler was obtained, the railroads, through the AAR and its predecessors, ultimately adopted as standard or alternate standard new and improved couplers for use on freight cars, known respectively as the "E", Swivel, and "F" couplers. In 1937 the first standard coupler for use exclusively on passenger cars was adopted, known as the "T" coupler. Subsequently, and after modification and improvement, a passenger car coupler, known as the "H" or Tight Lock coupler, was adopted as standard. Thereafter an additional passenger car coupler, known as the Controlled Slack coupler, was adopted as an alternate standard. From time to time modifications in these standards were adopted. The development and adoption of each additional standard or modification of existing standard were based upon sound engineering reasons.

41. As a result of growing apprehension on the part of the defendant manufacturers and their counsel with respect to interpretation of the antitrust laws, the defendant manufacturers on February 1, 1945 cancelled, as of December 31, 1944, the Standard Coupler Agreement of 1916 and other agreements amendatory thereof or supplementary thereto, including the non-exclusive licenses which had been issued by the Board to the defendant manufacturers and others for utilization of patented inventions in the standard coupler and attachments. Pursuant to such cancellation, the Board reconveyed to such of the manufacturers as were grantors the limited exclusive rights under unexpired patents previously conveyed to the Board, thereby terminating those exclusive rights. The Board of Trus-

tees was then dissolved. AAR did not learn of such cancellation by the defendant manufacturers until 1948.

42. At or about the time of the termination of the Standard Coupler Agreement of 1916 there occurred substantial changes which have continued to the present time in the method by which each of the defendant manufacturers conducted its business, including the following:

(a) There have been no business quotas allocated among the defendant manufacturers.

(b) There has been no fixing of prices for standard couplers or standard coupler parts by agreement or understanding among the defendant manufacturers or otherwise.

(c) There has been no agreement or understanding among the defendant manufacturers with respect to whether or not, or as to the terms upon which, any defendant manufacturer would issue a license under any patent owned by it and covering a feature embodied in a standard coupler, either to any of the other defendant manufacturers or to any other person or company. It has been the practice that each defendant manufacturer owning such a patent would license each other defendant manufacturer thereunder on a non-exclusive basis at a nominal royalty so that, regardless of the ownership of patents, all present manufacturers of standard couplers have been able to continue to manufacture standard couplers and standard coupler parts on a competitive basis, and non-patent owners have substantially increased the amount of their business in standard couplers and parts therefor without demand for, or threat of, increase in royalty, payment of penalty, or refusal to renew licenses.

(d) There has been no agreement or understanding among any of the defendant manufacturers to allocate customers.

(e) Competition among the defendant manufacturers to obtain the maximum possible business in standard couplers and standard coupler parts has resulted in a veritable cat and dog fight, wherein each has tried to get all the business away from the others that it can.

(f) The smaller coupler manufacturers have consistently increased their business in standard couplers and standard coupler parts at the expense of the larger manufacturers.

43. Following termination of the Standard Coupler Agreement as of December 31, 1944, licensing arrangements among the manufacturers have consisted of non-exclusive licenses granted to others by those owning patents. Such licenses have contained no quota or price restrictions. In most instances the licenses have been for the term of two years and have ordinarily been renewed for similar periods. Each of the licenses has granted rights limited to the manufacture, use and sale of standard couplers. An interchange of patent rights through such licensing arrangements is required to permit all the defendant manufacturers to produce and sell those couplers free from claims of patent infringement.

44. The licenses to Canadian manufacturers referred to in Finding 27 having been cancelled along with the Standard Coupler Agreement of 1916, as of January 1, 1945 the defendant manufacturers severally granted to Canadian Car and Foundry Company Limited, the successor to Canadian Steel Foundries, an exclusive license under the Canadian patents then and thereafter owned by the Licensors to manufacture and sell standard couplers in Canada. Provisions reflecting the requirements of the Canadian patent laws regarding revocation or invalidation of patents by reason of importation of patented articles into Canada were included in such license. The license was cancellable on six months' notice. Pursuant to the provi-

sions of such license, Canadian Car and Foundry granted a sub-license to Dominion Steel Foundries.

45. Under Canadian patent laws the defendant manufacturers who do not own Canadian patents on features embodied in standard couplers cannot manufacture standard couplers or standard coupler parts and export them into Canada without infringement of Canadian patents owned by others of the defendant manufacturers. Further, under Canadian patent laws those of the defendant manufacturers who own Canadian patents covering features embodied in standard couplers and standard coupler parts cannot export into Canada standard couplers made outside of Canada and embodying such features without endangering the validity of their Canadian patents. Canadian manufacturers of standard couplers and standard coupler parts embodying features covered by United States patents owned by any of defendant manufacturers cannot manufacture standard couplers embodying such features in Canada and export them into the United States without infringing said United States patents.

46. In connection with renewal of the post-1944 non-exclusive licenses, negotiations have been conducted among representatives of defendant manufacturers owning patents to determine the relative value of patents owned by each such manufacturer. Royalty figures contained in subsequent licenses have been based upon such relative patent values. These royalties have always been nominal in amount.

47. Following dissolution of the Board of Trustees under the Standard Coupler Agreement, the determination of whether or not to grant licenses under patents owned by any of the manufacturers for manufacture and sale of standard or alternate standard couplers, as well as the determination of the respective licensees to which such licenses have been and are to be granted, has been made by each manufacturer separately and independently.

There has been no agreement or understanding, express or implied, between or among any of the manufacturers to restrict or in any way affect or limit the manner in which any manufacturer holding patents relating to standard couplers or standard coupler parts shall exercise such patent rights, or any such agreement or understanding to exclude others from the standard coupler business.

48. Since January 1, 1945 and for many years before 1945 the market for standard couplers has been contracting, with no reasonable expectation that it will expand in the future. The total number of railroad cars in service on the railroads of the United States and Canada has continued to shrink for the last more than twenty-five years, with no indicated probable change in this trend. As a result, any increase in the business of manufacturing and selling standard couplers and standard coupler parts which is to be enjoyed by any of the defendant manufacturers must necessarily result in a comparable decrease in the business of some other or others of the defendant manufacturers.

49. At least since January 1, 1945 National Malleable has possessed the largest productive capacity for the production of standard couplers and standard coupler parts of any of the defendant manufacturers, and has at all times had the ability to produce standard couplers and standard coupler parts on a lower cost basis than that enjoyed by any of the other defendant manufacturers and at all times has been the largest producer of standard couplers and standard coupler parts.

50. Uniformity of prices in standard couplers and standard coupler parts since January 1, 1945 has resulted not from conspiracy or agreement, but from economic necessity. Since standard couplers and coupler parts of a given type are identical, no matter by whom manufactured, and are completely interchangeable, the competitors of National Malleable are unable to charge a higher price for

such products than National Malleable and obtain any business. Were National Malleable's competitors to charge less for these standard items than it charges, the result would merely be to reduce the price level, because National Malleable must meet such competition in order to obtain the business.

51. Prices charged by defendant manufacturers since January 1, 1945 for standard couplers and standard coupler parts have been established on two bases. One price has been established for standard couplers and standard coupler parts delivered in what is denominated as base territory, and a higher price has been charged for such products when delivered outside of base territory.

52. Base territory, although modified from time to time, was originally prescribed during the period of the existence of the Board of Trustees and, generally speaking, includes the east central part of the United States.

53. Since January 1, 1945 prices for complete standard couplers or standard couplers less any or all operating parts inside base territory have been f.o.b. manufacturer's plant with freight allowed at the carload rate to the nearest point on the line of road (i.e., taking lowest rate of freight) if ordered for delivery to railroads in or entering base territory, or to base territory destinations if ordered for delivery to companies other than railroads; prices for complete standard couplers, or standard couplers less any or all operating parts, outside base territory have been f.o.b. manufacturer's plant and have consisted of the price at which the same item is priced for sale inside base territory, plus the amount of a freight differential computed on a formula which approximately reflects the additional cost of transportation of the item to the destination outside of the base territory over the cost of transportation of the same item within base territory, with freight allowed at the carload rate from the manufacturer's plant to the point of delivery; prices for standard coupler parts ordered for delivery in

base territory or outside base territory have been f.o.b. manufacturer's plant with no allowance for freight.

54. Defendant manufacturers other than National Malleable have followed National Malleable's prices for standard couplers and standard coupler parts whether for delivery inside or outside of base territory. The decision of each of the other defendant manufacturers to follow the prices announced by National Malleable for standard couplers and standard coupler parts both inside and outside base territory was in each case a matter of unilateral, internal and independent action by such manufacturer and did not result from any agreement, conspiracy or understanding among the defendant manufacturers.

55. At no time has National Malleable communicated to competing defendant manufacturers information as to the changes in prices which it proposed to make until after decision as to such change had been made as a matter of unilateral, internal and independent action on its part.

56. National Malleable's prices for delivery of standard couplers and standard coupler parts outside of base territory since January 1, 1945, have been ascertained by competing defendant manufacturers from customers, and also from National Malleable. Each of the defendant manufacturers competing with National Malleable having determined unilaterally and independently to follow National Malleable's prices for deliveries outside base territory has, from time to time, requested National Malleable to furnish to it a copy of its freight differential currently in use, and National Malleable has acceded to such request. After obtaining such freight differentials, the defendant manufacturers other than National Malleable have used them for the purpose of following National Malleable's established delivered prices for standard couplers and parts outside of base territory.

57. After each defendant manufacturer has determined its prices for standard couplers, standard coupler parts and

yokes, such prices have been announced and distributed generally to the trade and the public. There has been no effort on the part of any defendant manufacturer to restrict dissemination of its established prices for standard couplers and standard coupler parts to its competitors, or to give competitors notice of changes in such prices in advance of the general distribution of such information to the trade and public.

58. As a result of the activity of their salesmen and the contact of such salesmen with railroad customers, defendant manufacturers competing with National Malleable have usually obtained information with respect to changes in National Malleable's prices from their customers before they have been able to obtain such information from National Malleable.

59. Since January 1, 1945 the terms and conditions of sale, such as the periods during which published prices will remain firm on the date by which orders must be placed to obtain a published price, established from time to time by the defendant manufacturers have not been uniform, but have been varied by them for competitive purposes as have sales inducements utilized by various ones of them. Defendant manufacturers from time to time have deviated from the published prices set forth in their price lists for both standard couplers and standard coupler parts and yokes to meet competitive conditions.

60. Since April 8, 1946, when maximum price limitations imposed by law or by OPA regulation upon the sale of standard couplers, standard coupler parts and yokes were removed, National Malleable has issued approximately thirteen price schedules for standard couplers and coupler parts. In almost all instances, the other defendant manufacturers have issued new price schedules for standard couplers and standard coupler parts shortly after issuance of the price schedule of National Malleable.

61. From January 26, 1951 to February 12, 1953 maximum prices for standard couplers and standard coupler parts were regulated by the Office of Price Stabilization, and during that period the defendant manufacturers all adhered to the maximum price levels established by the OPS.

62. In the latter part of 1947 National Malleable changed its price policy on standard couplers and standard coupler parts, stating that said products would be priced at prices prevailing at the time of delivery rather than at prices prevailing at the time of order or sale. Subsequent to National Malleable's publication of this change in pricing policy, the other defendant manufacturers followed and adopted the policy of pricing couplers at prices in effect at the time of delivery.

63. Before it publicly announced its policy to price standard couplers and standard coupler parts at prices prevailing at the time of delivery, National Malleable's Vice President Moriarty, in discussions with National Malleable's customers and competitors, stated his opinion that in the face of continually rising costs of labor and material any system of pricing other than that in effect at the time of shipment or delivery was unwise. Such discussions were not held for the purpose of obtaining any agreement or understanding among competitors with respect to prices; were not conducted pursuant to any conspiracy with respect to prices; did not constitute a request or an invitation to competitors to participate in or give adherence to any plan, understanding, agreement or program for the establishing or maintenance of prices on standard couplers or standard coupler parts; nor was it contemplated by National Malleable, or any other of defendant manufacturers, that as a result of said discussions concerted action in the establishment of prices by any of the defendant manufacturers was agreed upon or to be expected. At most Moriarty hoped that his competitors might view the economic situation as did he.

64. National Malleable's decision in 1947 to establish its prices for standard couplers and standard coupler parts as those effective at the time of shipment or delivery, and the decision of each of the other defendant manufacturers to establish similar effective dates for prices of standard couplers and standard coupler parts, were in each case made independently, internally and unilaterally, without knowledge or understanding as to the action to be taken by any other manufacturer and not as the result of any understanding, agreement or conspiracy between or among defendant manufacturers.

65. Ever since 1945 personnel of the defendant manufacturers responsible for production methods and techniques in the manufacture of standard couplers and standard coupler parts have followed the practice of visiting each other's plants and the plants of other foundrymen for the purpose of informing themselves as to general foundry production techniques. In 1946 the cost accountants of some of the defendant manufacturers exchanged among themselves basic data with respect to the costs of their respective employers incurred in the production of certain standard couplers, standard coupler parts and yokes; and from 1945 until 1950 the cost accountants of these defendant manufacturers and other foundrymen visited each other's plants and met together from time to time to exchange views on cost accounting techniques and principles relating to the foundry and steel castings business generally. These visits and exchanges of information were not made as a part of or in furtherance of any conspiracy to fix prices, but rather were for the purpose and had the result of actually reducing manufacturing costs, developing new methods of manufacture, and increasing efficiency in both manufacturing and accounting processes. The exchange of information so resulting encouraged rather than restrained competition among the defendant manufacturers. During the visits of production experts and ac-

countants of the defendant manufacturers to each other's plants, the prices of standard couplers and standard coupler parts were never discussed.

66. Patent licenses in existence among the coupler manufacturers since January 1, 1945 have included customary provisions requiring the licensee to report to the licensor monthly shipments of couplers and coupler parts by the licensee. Prior to 1951 the licenses granted by National Malleable required the licensee to report orders received as well as shipments. Prior to 1953 the licenses granted by ASF contained a similar requirement that licensees report orders received. The information contained in such reports has been used only for purposes of internal management and sales promotion and has had no restraining effect upon competition.

67. Since January 1, 1945 there has been no effort whatsoever on the part of any of defendant manufacturers to restrict the volume of business done by any other of the defendant manufacturers.

68. As established by evidence offered by both plaintiff and certain of the defendants, the respective percentages of the total shipments of standard couplers and standard coupler parts of all the defendant manufacturers enjoyed by each of them have varied substantially from year to year since January 1, 1945, and have never conformed to the quotas previously in existence during the period of the Standard Coupler Agreement of 1916.

69. Since January 1, 1945 there has been no effort by those of defendant manufacturers owning patents covering features embodied in any standard coupler or standard coupler parts to limit or restrict the amount of business done by its licensees.

70. At all times since January 1, 1945 each of the defendant manufacturers has had surplus and unused capacity for the production of standard couplers and standard coupler parts. Despite the most intense competition

for business in standard couplers and standard coupler parts, no defendant manufacturer has, at any time since January 1, 1945, been able to sell as many standard couplers or parts as it has the capacity to produce.

71. Although the vast majority of all standard couplers and standard coupler parts are produced as castings, without machining, they are at the same time produced to unusually close tolerances, as close as 1/32nd of an inch, and despite this since January 1, 1945 they have been consistently sold at average prices of approximately three-fifths the average prices of miscellaneous steel castings.

72. For a manufacturer to equip a foundry, already established and equipped to produce steel castings, to produce only the standard types E, H and F couplers and parts therefor would cost in excess of Nine Hundred Thousand Dollars.

73. Since January 1, 1945 no manufacturer other than defendant manufacturers, after investigation of the business has sought to invest venture capital to manufacture and sell standard couplers or standard coupler parts, and because of the economic factors prevailing in the business there is no probability that any new manufacturer will desire so to do in the future.

74. During the period of approximately thirty years from the date of the original execution of the Standard Coupler Agreement of 1916 until its termination in 1945, none of the defendant manufacturers or the Board of Trustees issued licenses to manufacture standard couplers or standard coupler parts in the United States to others than defendant manufacturers. During this period National Malleable responded to two communications from concerns inquiring as to coupler manufacturing and licensing, in substance, that since the standard "D" coupler was manufactured under patent licenses and that manufacture under these licenses had been arranged for some time, it could not negotiate concerning such matters. The

Board of Trustees responded to six communications, the last of which was received in 1937, concerning patent licensing in connection with the manufacture of standard couplers or standard coupler parts, stating generally in substance in each instance that the items were manufactured under patent licenses; that production capacity of the existing licensees was equal to or in excess of the probable demand; and that therefore it seemed unwise to issue further patent licenses at that time. In 1941 the Board of Trustees responded to an inquiry concerning the manufacture of yokes that, since the existing manufacturers were all equipped to turn out almost any quantities of these yokes that might be required at reasonable prices, there did not appear to be any necessity for bringing other capacity into production of the yokes in question. On two occasions by the Board of Trustees and one occasion by defendant National Malleable notices of patent infringement were addressed to persons who were alleged to have been manufacturing couplers including features of the standard coupler covered by patents owned by one or more of defendant manufacturers.

75 In light of the credible and convincing oral testimony and the uncontradicted documentary evidence which establishes, not only the changes made by the defendant manufacturers in the conduct of their respective businesses at or about the time of the cancellation of the Standard Coupler Agreement of 1916, but also the manner in which each defendant manufacturer has conducted its business and the unrelenting competition which has prevailed among the defendant manufacturers since the cancellation of the Standard Coupler Agreement of 1916, no inference is drawn from any of the evidence with respect to the conduct of defendant manufacturers prior to January 1, 1945, that they are now presently conspiring to or presently intend to violate the antitrust laws or that there is any present threat that they will do so in the future.

76. Since January 1, 1945 no one other than the defendant manufacturers, has evidenced any serious interest in obtaining the right to manufacture standard couplers, standard coupler parts or standard yokes. The Southern Railway did not request a license for manufacturing rights and by its own admission only "toyed" with the idea. Maritime Steel & Foundries, Ltd., sought, not manufacturing rights, but a financial bail-out. Information desired by Sorel Industries, Limited, regarding coupler drawings and dimensions was furnished. Pratt and Letchworth, after receiving advice as to how it could obtain both know-how and manufacturing rights for yokes, made no effort whatever to obtain them. The only other inquiry received by defendant manufacturers after January 1, 1945 concerned drawings, and was from a hobby house, "Doc Fixit". In the light of the direct, credible and convincing oral evidence, and the uncontradicted documentary evidence to the contrary, no inference is drawn from the facts found in this paragraph of these findings that the defendant manufacturers or any of them presently intend to conspire or are conspiring to violate the antitrust laws, or that there is any present threat that they will do so in the future.

77. In the light of the uncontradicted documentary evidence and the testimony of the responsible officers of the defendant manufacturers, which the Court finds credible and accepts, the Court finds that since the cancellation of the Standard Coupler Agreement of 1916 in 1945 and the changes which accompanied it in the manner and method by which the defendant manufacturers conduct their business, the defendant manufacturers have at all times been engaged in vigorous and effective competition in the sale of standard couplers, standard coupler parts and yokes, without any agreement whatsoever to fix prices therefor, to allocate business therein, to divide customers therefor, or otherwise to limit the ability or efforts of any one of said defendant manufacturers to sell all of said

standard couplers, standard coupler parts, and yokes which the exercise of its maximum sales effort will produce in the light of the economic conditions existing. There is no present threat of any change in this situation.

78. None of the defendant manufacturers has any present intent to monopolize the manufacture, sale or distribution of standard couplers, standard coupler parts or standard yokes in or among the several states and Canada. The fact that, since January 1, 1945, no manufacturer other than defendant manufacturers has entered the business of manufacturing standard couplers or standard coupler parts in the United States has resulted from economic forces beyond the control of defendant manufacturers, and not from their conduct either before or after January 1, 1945.

79. Neither AAR nor any of its predecessors has boycotted or agreed with defendant manufacturers or with anyone to boycott the purchase or use of non-standard couplers or coupler parts, and AAR would have no objection if persons or corporations other than the defendant manufacturers and other than their Canadian licensees were licensed to manufacture AAR standard couplers.

80. There is no evidence that AAR or any of its predecessors:

(a) has ever owned or controlled any patents on couplers or coupler parts;

(b) has ever had any contract right or any other right to compel the holders of patents on couplers or coupler parts to grant licenses thereunder;

(c) has ever sought or attempted to prevent the holders of patents on standard couplers and parts from granting licenses to anyone;

(d) has ever persuaded or attempted to persuade anyone not to request licenses under such patents.

81. There is no evidence that AAR or any of its predecessors have ever agreed with the defendant manufacturers or with anyone;

(a) that the holders of patents on standard couplers and coupler parts should not grant licenses thereunder to persons or corporations other than the defendant manufacturers;

(b) that member railroads would purchase standard couplers or coupler parts or any other couplers or coupler parts only from the defendant manufacturers, or only from the defendant manufacturers and their licensees;

(c) that AAR or its predecessors would not adopt as standard a coupler or coupler part invented or manufactured by a person or corporation other than the defendant manufacturers; or

(d) that only such couplers and coupler parts as are recommended by the Mechanical Committee of the Standard Coupler Manufacturers or by the defendant manufacturers would be approved as standard.

82. There is not now in existence and there was not in existence at the time the complaint in this case was filed in 1953 and for at least eight years prior thereto, any combination or conspiracy among any or all of the defendants in unreasonable restraint of, or to monopolize, nor did there exist any monopolization of, trade and commerce in couplers, coupler parts and yokes among the several states or with Canada for the purpose of, or with the effect of;

(a) preventing and excluding persons other than defendant manufacturers from manufacturing and selling couplers and coupler parts adopted, approved or designated as standard by the AAR;

(b) fixing and maintaining uniform and noncompetitive prices, discounts, allowances, and other terms and conditions, for the sale of standard couplers, standard coupler parts and yokes;

(c) dividing and apportioning among defendant manufacturers the available business in standard couplers and coupler parts;

(d) excluding others than defendant manufacturers from the manufacture and sale of certain types of yokes, designated as "Y-30", "Y-35", "Y-45", "Y-50", "Y-60", and "Y-65";

nor does there now exist any present threat that any such combination or conspiracy or monopolization will be entered into or carried out in the future by any or all of the defendants.

83. There is not now in existence, and there was not in existence, at the time the complaint was filed in 1953, or for at least eight years prior thereto, any combination or conspiracy among any or all of the defendants in unreasonable restraint of, or to monopolize, nor did there exist any monopolization of, trade and commerce with Canada for the purpose of, or with effect of, suppressing and eliminating competition among and between defendant manufacturers and the two Canadian corporations, Canadian Car and Foundry Company, Ltd., and Dominion Foundries and Steel, Ltd., by any or all of them agreeing that defendant manufacturers will not sell standard couplers and coupler parts in Canada except with the consent of the Canadian corporations, and that the two Canadian companies will not sell said products in the United States; nor does there now exist any present threat that any such combination or conspiracy or monopolization will be entered into or carried out in the future.

84. As used in these findings of fact the words "January 1, 1945" shall be deemed to mean on or about the time of the termination and cancellation of the Standard Coupler Agreement of 1916.

CONCLUSIONS OF LAW

1. None of the defendants is violating or threatening to violate either Sections 1 or 2 of the Sherman Act, 15 U.S.C. Secs. 1 and 2, nor was it violating or threatening to violate such sections of the Sherman Act at the time the

Complaint was filed in 1953, by engaging in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce in couplers, coupler parts or yokes among the several states or with Canada.

2. None of the defendants is violating or threatening to violate either Section 1 or 2 of the Sherman Act, nor was it violating or threatening to violate such sections of the Sherman Act at the time the Complaint was filed in 1953, by engaging in an unlawful combination and conspiracy to monopolize trade and commerce in couplers, coupler parts or yokes among the several states or with Canada.

3. None of the defendants is violating or threatening to violate Section 2 of the Sherman Act, nor was it violating or threatening to violate such section of the Sherman Act at the time the Complaint was filed in 1953, by unlawfully monopolizing trade and commerce in couplers, coupler parts and yokes among the several states or with Canada.

4. There being no present violation, threat of future violation, or present necessity for relief to dissipate the effects of past violations, if any, of the Sherman Act by any of the defendants in the respects alleged in the Complaint, or appearing upon the trial, the relief prayed for by plaintiff should be denied, and the Complaint should be dismissed.

/s/ JAMES C. CONNELL
JUDGE

Date: March 12, 1958

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. 160

UNITED STATES OF AMERICA, *Appellant,*

vs.

NATIONAL MALLEABLE & STEEL CASTINGS CO., *et al.*

On Appeal From The United States District Court For The Northern District of Ohio

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MOTION TO DISMISS OR AFFIRM BY ASSOCIATION OF AMERICAN RAILROADS

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The Association of American Railroads was one of the defendants in this civil anti-trust action, but is not a manufacturer of couplers or parts and is *not* one of the "defendant manufacturers" referred to in the questions presented on appeal.

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the Association of American Railroads (hereinafter referred to as "AAR") moves that the appeal be dismissed as to it on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to the rules of this Court. In the alternative, AAR moves that the judgment of the District Court dismissing the complaint against AAR be affirmed on the

ground that it is manifest that, as to AAR, the questions on which the decision depends are so unsubstantial as not to need further argument.

I. THE APPEAL SHOULD BE DISMISSED AS TO AAR BECAUSE THE QUESTIONS PRESENTED FOR REVIEW ON THE APPEAL ARE CONFINED TO THE DEFENDANT MANUFACTURERS AND DO NOT INVOLVE AAR.

None of the questions presented on this appeal names or involves AAR. This is true with respect both to the original statement of the questions in the Notice of Appeal and to the slightly revised form in which those questions are set out in the Jurisdictional Statement. At the outset (page 3) of the Jurisdictional Statement, however, it is said that the appellees include AAR. That introductory statement, which may have been inadvertent, necessitates this motion.

AAR is an unincorporated association composed of the principal railroads of the United States, Canada and Mexico. Its situation with respect to the issues of this case, and particularly with respect to the questions presented for review on this appeal, is distinctly different from that of the five other defendants.

The five defendants other than AAR are manufacturers of standard couplers and parts. Appellant states on page 3 of the Jurisdictional Statement that those five defendants "are the sole manufacturers" thereof. Included among them are the owners of the standard coupler patents discussed in the Jurisdictional Statement (p. 14). In the Notice of Appeal and the Jurisdictional Statement those five defendants are referred to, as they have been throughout this proceeding, as the "defendant manufacturers."

In contrast, as the District Court found, "Neither AAR nor any predecessor of AAR has manufactured or sold couplers or coupler parts" (Finding 3) and "There is no evidence that AAR or any of its predecessors: (a) has ever owned or controlled any patents on couplers or coupler parts; * * *" (Finding 80).

The complaint charged the defendant manufacturers with several different offenses against Section 1 and 2 of the Sherman Act. It included AAR as a defendant only with respect to the charge that manufacturers other than the defendant manufacturers have been excluded from the manufacture of standard couplers.* Charges with respect to alleged fixing of prices and terms of sale, for example, which are discussed in the Jurisdictional Statement, were never made against AAR.

By the time the trial commenced in the District Court, after the appellant had taken extensive discovery depositions and reviewed the files of the AAR and the defendant manufacturers, the nature of appellant's single claim against AAR had drastically changed. The formal charge in the complaint was that AAR had conspired and agreed to exclude persons other than the defendant manufacturers from making and selling the standard couplers. In a pretrial memorandum, filed shortly before the opening of the trial, appellant stated, instead, that "By their [AAR's] *inaction* they have aided the standard coupler manufacturers in maintaining their monopoly" (p. 3) and conceded that AAR was "*Without any willful intent* to help the defendant

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*At numerous points in the complaint the comprehensive word "defendants" was included without qualification, but it developed that appellant's use of that word, rather than the term "defendant manufacturers", was inadvertent. After inquiry from AAR, appellant filed a "Clarification of Complaint in re Defendant Association of American Railroads" (R. 24-25) making this plain.

manufacturers continue their monopoly * * *" (p. 4).* In the opening statement to the District Court appellant said that an injunction against AAR was sought "because the Association of American Railroads themselves have not by their own action, by their own initiative, taken measures to see that they don't *unwittingly* aid in the violation of the anti-trust laws * * *" (Transcript 14-15). Appellant stated in the closing argument, not that AAR was doing or threatening to do something unlawful, but that "AAR has failed to do anything" to prevent the defendant manufacturers from allegedly excluding potential competitors of the defendant manufacturers from making and selling standard couplers (Transcript 2583).

The District Court, after rendering an extensive oral opinion which is set out in the appendix to the Jurisdictional Statement, and after making extensive findings of fact and conclusions of law, found that neither the defendant manufacturers nor AAR were violating or threatening to violate the Sherman Act and dismissed the action against all defendants.

Appellant's Notice of Appeal states four questions presented by the appeal. Not one of them involves AAR. The second and third questions concern the setting of prices by the defendant manufacturers and the fourth question concerns rejection of evidence of the defendant manufacturers' alleged participation in a foreign cartel. No such charges were ever made against AAR. The first question presented by appellant concerns the alleged power and purpose of the defendant manufacturers to exclude competitors and thereby to monopolize and continue to monopolize a part of interstate commerce. Like the second, third and fourth questions,

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* Emphasis by italics has been added here and throughout this motion, except as otherwise indicated.

it is expressly limited to "the defendant manufacturers." It reads as follows:

> "1. Whether the *defendant manufacturers,* having jointly designed and developed a standard coupler for railroad cars, having jointly withheld from others data as to the sizes, dimension, and tolerances requisite for manufacture of the standard coupler and its parts, and having erected other barriers to entry into the trade involved, possessed the power and purpose to exclude competitors, and thereby monopolized, and combined to monopolize, a part of interstate commerce in violation of Section 2 of the Sherman Act." (p. 4)

In the Jurisdictional Statement, the wording of this question is slightly changed, but again it is expressly limited to the defendant manufacturers. The Jurisdictional Statement presents this question as follows:

> "1. Whether, on the showing that *defendant manufacturers* had jointly designed and developed the standard coupler, had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts, and had erected other barriers against entry into manufacture of such coupler and its parts, the district court erred in failing to find and to conclude that *defendant manufacturers* possessed the power and purpose to exclude competitors, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." (p. 3)

The fact that AAR is not involved in the questions presented on appeal is further emphasized in the Jurisdictional Statement as follows:

> "The basic question presented by the appeal, therefore, is whether the defendants abandoned their monopolization, conspiracy to monopolize, and conspiracy to eliminate price competition and to sell at uniform

prices when they formally abrogated the 1916 agreement.

"1. We submit that facts which stand admitted establish that the *defendant manufacturers* have, since 1945 as before, illegally monopolized trade and commerce in standard couplers and coupler parts." (p. 16)

* * * * *

"2. We submit that on the admitted facts the *defendant manufacturers* were engaged in an illegal price-fixing combination." (p. 18)

Here again it is apparent that the questions on appeal involve only the defendant manufacturers. While the broad word "defendants" is used in the statement of this "basic question," obviously the word refers only to the defendant manufacturers. This is plain both from the appellant's two answers to the "basic question" and also from the fact that the 1916 agreement to which appellant refers (and which it discusses at some length in the Jurisdictional Statement) was an agreement solely among the defendant manufacturers. "Neither AAR nor any of its predecessors was ever a party to the Standard Coupler Agreement of 1916, or to any other agreement supplementary or amendatory thereto" (Finding 24).

While the Notice of Appeal stated formally and generally that appellant was appealing from the judgment below, it presented no question that involved AAR or that comprised any question about AAR. Rule 10, paragraph 2, of the Revised Rules of Practice of this Court provides that "Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." The complete difference in circumstances between AAR and the defendant manufacturers thoroughly justified appellant in excluding AAR from the questions presented on appeal, but by the same token AAR should not be retained as an appellee. The appeal should be dismissed as to AAR.

II. IF THE APPEAL IS NOT DISMISSED, THE DECISION BELOW AS TO AAR SHOULD BE AFFIRMED.

If all the questions presented for review by this Court were answered in the affirmative, as appellant requests, the result would be a finding that the *defendant manufacturers* "possessed the power and purpose to exclude competitors" and to eliminate price competition among themselves. But such a decision against the defendant manufacturers would afford no basis whatever for reversing the District Court's judgment dismissing the complaint against AAR. If the appeal is not dismissed as to AAR, clearly the judgment dismissing the complaint as to AAR should be affirmed on the ground that there is no substantial question that needs further argument.

A brief review of the facts and the questions raised about AAR in the District Court will further confirm the fact that there is no substantial question as to the decision below with respect to AAR.

One of the functions of AAR, through its Mechanical Division, is and has been the adoption of various standards (including alternate standards) for railroad car construction and for the numerous component parts of railroad cars, including couplers (Finding 5). Standard and alternate standard couplers are those couplers adopted as such from time to time by the member railroads of AAR or its predecessors (Finding 6). In this connection the Jurisdictional Statement speaks only of "the standard coupler" as if there is and has been only one such coupler (for example, at pp. 3, 4 and 6). The fact is that as new designs of couplers prove their merit, in the judgment of the railroad members of AAR as expressed by ballot of such railroads, they have been adopted as standard (Findings

8, 37). The original standard coupler, which was adopted as standard in 1916 and known as the "D" coupler, has been replaced by couplers later adopted as standard. For freight cars there are now three different designs of couplers which have been adopted as standard or alternate standard ("E", Swivel, and "F" couplers) and for passenger cars there are now two different designs, the "H" or Tight Lock coupler, and the Controlled Slack coupler (Finding 40). The railroads also adopt various modifications in a particular design of standard or alternate standard coupler from time to time as new improvements are developed (Findings 8, 40).

Such standards have been adopted on the basis of the judgment of the members of the AAR Committee on Couplers and Draft Gears and the judgment of the individual railroad members of AAR as to the mechanical merit, safety and cost of the articles (Finding 39). In adopting such standards, AAR and its predecessors have *not* done so for the purpose of limiting the manufacture thereof to the defendant manufacturers (Finding 39). Such standardization has greatly reduced the number of deaths and injuries from railroad operation and has further benefited the public through resulting economy to the railroads. "Plaintiff concedes, and the Court finds, that the standardization of couplers is necessary, desirable and beneficial" (Finding 20).

Despite the adoption of particular designs of couplers as AAR standards, each railroad retains the independent right to purchase and use any kind of coupler it may desire, regardless of whether it meets AAR standards, and that right has been exercised from time to time (Findings 9, 10). There is no agreement or understanding that the railroads will confine their purchases to such standard types (Finding 10).

It is frequently necessary for cars to be tendered from one carrier to another for interchange and haul over the line of the connecting carrier. Under an Interchange Agreement signed not only by the individual railroads, but also by the appellant and other non-railroad owners of freight and passenger cars, each road agrees that it will accept cars in interchange that are equipped with couplers (and other equipment) meeting AAR standards. While cars equipped with non-standard couplers may be refused in interchange, it is important to note that refusal is not required and in practice railroads have interchanged cars with non-standard couplers and other non-standard equipment, exercising their independent right (Finding 12).

In the Jurisdictional Statement appellant makes a statement in this connection which, unless carefully read and checked against the finding therein referred to, might create a wrong impression. It states, at page 6, that "the railroads' interchange rules, adopted pursuant to their Interchange Agreement, require connecting carriers to accept in interchange only cars equipped with the standard coupler (fng. 11)." Finding 11 actually states that "The Interchange Rules require connecting carriers to accept cars tendered in interchange if equipped as provided in the rules. Cars equipped with non-standard couplers may be refused in interchange, but refusal is *not* required," and Finding 12 is that "Many railroads, members of AAR and its predecessors, have interchanged cars with equipment of various kinds differing from the equipment specified in the Interchange Rules, including non-standard couplers and non-standard parts." For example, the Swivel Butt coupler and the Controlled Slack coupler were purchased and used on various railroads, including use in interchange, for some years while they were non-standard, and before they were adopted as alternate standard couplers (Def. Exs. 386-413; Transcript 842-843, 1330-1331, 1346-1347).

Appellant stated, in the District Court, that "AAR is a group of buyers who agree to boycott the purchase of couplers other than the standard type, other than the standard coupler for use in interchange, and the plaintiff contends that this boycott is justified to insure safety and to reduce the cost to the public" (Transcript 2583). Despite the fact that appellant stated that such a boycott would be justified, the evidence showed that there was in fact no such boycott, that each railroad is free to use or accept in interchange cars equipped with non-standard couplers and that many railroads have done so, from time to time. The Court, in the oral opinion, found that AAR "boycotted no one" (Appendix to Jurisdictional Statement, p. 64) and made the following written finding of fact: "Neither AAR nor any of its predecessors has boycotted or agreed with defendant manufacturers or with anyone to boycott the purchase or use of non-standard couplers or coupler parts * * *" (Finding 79).

Some of the features contained in the designs of the various couplers that from time to time have been adopted as AAR standards have been the subject of patents issued to the defendant manufacturers. On page 14 of the Jurisdictional Statement appellant refers to such patents and to the patent licenses issued thereunder, and states that "No license to manufacture a standard coupler has ever been issued to anyone other than a defendant manufacturer." Such licenses obviously could be granted only by the defendant manufacturers who owned the patents, and not by AAR. As the District Court found, "AAR would have no objection if persons or corporations other than the defendant manufacturers and other than their Canadian licensees were licensed to manufacture AAR standard couplers" (Finding 79), but clearly AAR could not grant such licenses.

Similarly, it is the defendant manufacturers and not AAR who have the exclusive control over the master gauges and the dimension drawings made and used by the manufacturers. Access to these gauges and drawings, as appellant states, "is within the exclusive control of the defendant manufacturers" (Jurisdictional Statement, p. 13). AAR does not own or control the gauges or construction drawings. There was no contention that the gauges were furnished to AAR, and AAR was not furnished with copies of all of the construction drawings (Transcript 770, 777-778, 2245). As the Court found:

> "One set of the construction drawings of standard couplers, marked 'Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee' [of the defendant manufacturers] is usually furnished to AAR. Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives. AAR had no right or authority to reproduce or distribute copies of such drawings." (Finding 36)

Here again, as in the case of the patent licenses, AAR could not give copies of the defendant manufacturers' drawings to other persons, but it could and did refer those persons to the defendant manufacturers or their representatives who did have control over the distribution of the drawings.

As noted above, one of the findings of fact is that "AAR and its predecessors, in adopting standards for couplers and coupler parts, have not done so for the purpose of limiting or confining the manufacture of such articles to the defendant manufacturers * * *" (Finding 39). At page 15 of the Jurisdictional Statement, appellant states that "For standard products other than couplers, AAR attempts to insure that an unpatented article is permitted as an 'alternate standard' whenever the 'standard' article is patented

(Tr. 2242-3)." These pages of the transcript show that what the witness actually testified was that "in general terms, the practice would be that we would like to have them where there are such non-patented articles in existence" (Transcript 2242-2243). With respect to couplers, there is no evidence and no contention by appellant that there are any designs of non-patented couplers in existence which afford the mechanical and safety advantages of the several designs of couplers that have been adopted as standard or alternate standard. Incidentally, the transcript does not contain the word "permitted" which appears in appellant's statement quoted above. Each railroad is free to exercise its own judgment as to purchasing and using a particular item of equipment. It needs no "permission" from AAR.—

At the same page 15 of the Jurisdictional Statement, appellant then says that in 1949 AAR rejected a proposal of a railroad member that AAR withhold approval of any more patented improvements to the standard coupler unless the patent holder agreed to license any applicant. That railroad's proposal was not limited to couplers; it involved directly the balloting as to adoption of standards for other articles of car construction (brake beams) as well as improvements in couplers (Plf. Exs. 378-1379, 382-1386) and the railroad stated that its proposal applied to the adoption of "*any* patented article"* as AAR standard (Plf. Ex. 11-1383). It stated that the proposed changes in the coupler standards were "desirable," but proposed that the owners of patents be "forced to agree to license the manufacture of these proposed couplers by other manufacturers than those now holding these rights" (Plf. Ex. 380-1384). Just how AAR could "force" the patent holders to take the action proposed was never made clear and the legal dangers if

* Emphasis in original.

AAR were to attempt to exert any such force or to try to supervise the granting of licenses by the holders of patents in the railroad supply business are obvious.

If AAR refused to adopt as standard or alternate standard the patented couplers which are admittedly the best and safest couplers available, the standards would be obsolete. Any defendant manufacturer who would refuse to succumb to such "force" from AAR would still be free to sell his improved non-standard article to the railroads and they would still be free to purchase and use it. Moreover, the practical difficulty or impossibility of AAR's being able to force the patent owners to license other manufacturers than the defendant manufacturers is underlined by the fact that "Since January 1, 1945 no one other than the defendant manufacturers, has evidenced any serious interest in obtaining the right to manufacture standard couplers, standard coupler parts or standard yokes" (Finding 76).

The lack of substance in appellant's charges against AAR in the District Court was apparent from appellant's suggestions to that court as to what kind of injunction it could enter against AAR (Transcript 2584-2585). Appellant suggested that AAR be ordered not to adopt any patented feature as a standard until the patentee agrees to license "on reasonable terms anybody who wants to come along and wants to manufacture that part or the entire coupler." If the patentee declined to agree to such supervision and control by AAR, then AAR would be under court order to boycott the patented article from the standards, even though it might be the best and safest article available. As mentioned above, however, the legal and practical difficulties of AAR's setting itself up in this way as the supervisor of the licensing under the patents of various defendant manufacturers are evident. The suggested injunction would also order AAR to make available to the public the master manu-

facturing gauges, which belong to the defendant manufacturers, and the manufacturing dimensions which are developed by the defendant manufacturers and set out in their construction drawings. Appellant itself states that access to these drawings and gauges is under the exclusive control of the defendant manufacturers, who designed and made them (Jurisdictional Statement, p. 13). Clearly, this is a matter involving only the defendant manufacturers, not AAR. Appellant also suggested in the court below that AAR could be ordered by the court to "handle inquiries from potential manufacturers themselves without referring them to the [defendant] manufacturers" (Transcript 2584). How this could be done, when the defendant manufacturers hold the patent rights, is impossible to see. Moreover, as to all the matters mentioned above, if any orders were to be entered requiring disclosure of the manufacturers' drawings or gauges or requiring licensing under their patents "on reasonable terms," the supervision of such disclosure and licensing should be by the Court and not by or through AAR. Finally, appellant suggested an order compelling AAR to enlarge its "engineering facilities" so that when the defendant manufacturers recommend an improvement in the standard couplers "and that improvement is patented," AAR, before adopting it as standard, would undertake to attain that same improvement without patents (Transcript 2584-2585). The record, however, shows that "Of the forty-nine modifications and improvements so incorporated in the past twenty-five years, only one was patented at the time of its adoption" (Finding 32). Moreover, the procedure suggested by appellant in this respect, of deliberately designing around a patent to obtain the same improvement, obviously would present serious risks of patent infringement, as well as threatening delay in the adoption of an improvement which may be known to make the couplers less likely to cause derailments or personal injuries.

The District Court concluded that AAR, which has no power to compel the granting of licenses under patents held by the defendant manufacturers and no power to compel those defendant manufacturers to disclose to the public the manufacturers' drawings and gauges, and no intent to aid the defendant manufacturers in any monopoly, is not violating or threatening to violate the Sherman Act. That conclusion is plainly correct and it is manifest that the judgment dismissing the complaint against AAR was proper. No question as to that part of the judgment has been raised on the appeal, a fact which of itself evidences the lack of any substantial question concerning that part of the judgment below. If the appeal is not dismissed as to AAR, the judgment in that respect should be affirmed.

Respectfully submitted,

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On Appeal From The United States District Court For The Northern District of Ohio

STATEMENT OF ASSOCIATION OF AMERICAN RAILROADS REGARDING ABSENCE OF OPPOSITION TO ITS MOTION TO DISMISS OR AFFIRM

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TWENTIETH CENTURY PRESS, INC., CHICAGO 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

NO. 160

UNITED STATES OF AMERICA, *Appellant,*
vs.
NATIONAL MALLEABLE & STEEL CASTINGS CO., *et al.*

On Appeal From The United States District Court For The Northern District of Ohio

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STATEMENT OF ASSOCIATION OF AMERICAN RAILROADS REGARDING ABSENCE OF OPPOSITION TO ITS MOTION TO DISMISS OR AFFIRM

We respectfully invite the attention of the Court to the fact that the United States of America, appellant, has not opposed or objected to the granting of the Motion to Dismiss or Affirm by Association of American Railroads (AAR).

The title of the government's brief is "Brief for the United States in Opposition to the Defendant Manufacturers' Motion to Affirm." On page 1 of that brief, the government refers to "Appellees' motion to affirm" and on page 8 it states "that appellees' motion to affirm should be denied." By footnote on page 1 it states:

> "We use the word 'appellees' to apply to the appellees referred to in the jurisdictional statement as the defendant manufacturers, namely, National Malleable and Steel Castings Co., The Buckeye Steel Castings Company, The Symington-Gould Corporation (present name, Symington Wayne Corporation), and McConway & Torley Corporation."

AAR, which was one of the defendants below, is not a "defendant manufacturer". AAR's own motion to dismiss or affirm, which is not opposed by the government, pointed out that none of the questions presented on appeal involves AAR; that the filing of AAR's motion was necessitated only because the introduction to the Jurisdictional Statement said that the appellees included AAR; and that the statement may have been inadvertent.

The government's brief thus has conceded that AAR's motion should be granted. AAR should not be put to any further expense of participating in a proceeding concerning questions with which no one now contends it is involved. Its status on this appeal should be clarified by granting its motion to be dismissed as an appellee.

Respectfully submitted,

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September 9, 1958.

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No. 160

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE & STEEL CASTINGS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE DEFENDANT MANUFACTURERS' MOTION TO AFFIRM

I. THE SUBSTANTIALITY OF THE MONOPOLIZATION ISSUE

Appellees'[1] motion to affirm does not deny that they have both a complete monopoly of commerce in the standard coupler and its parts, and power to exclude others from such commerce. They do not deny our statements that the essential characteristic of the standard coupler is that each of its six basic parts

[1] We use the word "appellees" to apply to the appellees referred to in the jurisdictional statement as the defendant manufacturers, namely, National Malleable and Steel Castings Co., The Buckeye Steel Castings Company, The Symington-Gould Corporation (present name, Symington Wayne Corporation), and McConway & Torley Corporation.

is interchangeable regardless of which manufacturer was the producer; that to achieve this interchangeability a manufacturer must know the exact dimensions required for each part and be able to use the standard test (master) gauges developed by the Mechanical Committee; and that access to these gauges and to the required dimensions is within the appellees' "exclusive control" (J. St. 13).

Appellees' defense of the district court's ruling on the monopolization issue is grounded on the determination which the court is alleged to have made with respect to "the *subjective* issue of the general *intent* of the appellee manufacturers" (Motion 9). We submit, however, that the district court's own findings establish the existence of the only intent that is presently material, namely, appellees' intent to keep in their own hands *power* to exclude competitors. Its findings recognize that the drawings and gauges requisite to manufacture of the standard coupler and its parts were under the "control of" appellees' joint creature, the Mechanical Committee, and that appellees, in furnishing the Association of America Railroads (AAR) with one set of these drawings, marked them "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" (fng. 36). This prohibition against distribution and reproduction plainly was a deliberate and intended reservation of power to deny access to these drawings, which reservation of power necessarily comprehended power to exclude others from the industry.

It is, we believe, firmly settled that possession of power to raise prices or to exclude competitors is the

essential element of the monopolization of trade and commerce condemned by Section 2 of the Sherman Act and that, in order to establish a violation of the section, the only intent that need be shown is an intent to acquire or retain such power. The "material consideration" in determining whether there has been illegal monopolization is whether "power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811. While, in order to violate Section 2, there must be both power to monopolize and intent to monopolize, the requisite intent means no more than a purpose to acquire or retain power to monopolize. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432 (C. A. 2). No finding of "specific intent" to build a monopoly, in the sense in which the common law used the term "specific intent", is necessary to establish a violation: it is sufficient that monopoly is the consequence of the defendants' conduct; the forbidden end is then deemed purposeful in that "no monopolist monopolizes unconscious of what he is doing." *United States* v. *Griffith,* 334 U. S. 100, 105. Or, as otherwise stated, if "the necessary and direct consequence" of what was done is monopoly or monopolistic power, those so acting are "chargeable in legal contemplation with" purpose to accomplish this result. *Id.* at 108. In this sense, an intention to monopolize "may be assumed" when an alleged monopolist has "power over price and competition." *United States* v. *duPont,* 351 U. S. 377, 392.

In the instant case, there is neither finding nor evi-

dence that appellees lacked intent to retain for themselves power to exclude competitors. And, under the holding in *Griffith* (334 U. S. at 106, 109), support for the court's resolution of the monopoly issue may not be grounded on its generalized finding that none of appellees has any "intent to monopolize" the manufacture or sale of standard couplers (fng. 78). Moreover, the finding as to intent, and the court's determination of the monopolization issue, are to be judged in the light of the absence of any reference, in the court's lengthy opinion, to decisions of this Court dealing with monopolization or to the tests and principles which it has applied. We mention, to illustrate, the significance which the court below apparently attached to its conclusion that there had been no actual exclusion of competitors,[2] whereas this Court has specifically held (*American Tobacco,* 328 U. S. at 810)—

> Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

Since the issue raised by the Government's appeal is whether illegal monopolization continued up to the date of trial, appellees are plainly mistaken in relying upon the doctrine that, where the defendant has

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[2] "Not once in all these weeks of trial have we learned of anybody in particular who desired to actually get into this business and who had the competency to get in the business, who was kept out.

"I find that nobody ever wanted to get in. I find that nobody was kept out." (Opinion, J. St. 53.)

abandoned the charged illegal conduct and has unequivocably disclaimed any intention to renew it, the trial court has wide discretion in determining the need for granting injunctive relief.[3] We are aware of no decision holding that, where a current violation of the Sherman Act has been shown, the district court has discretion not only to deny all relief but to dismiss the Government's complaint. In any event, this kind of discretion was not exercised since the district court concluded that the evidence showed no violation of the statute.

We note briefly the district court's observation, to which appellees repeatedly refer (Motion 6, 11, 13, 14), that the railroad industry is "in a condition of contraction". The court reached this conclusion on the basis of "common knowledge" or "public knowledge" (J. St. 55–56), and the one item of evidence which appellees cite in support, Pltf. Ex. 1200–1827 (Motion 6), fails to show contraction in freight cars.[4]

II. THE SUBSTANTIALITY OF THE PRICE-FIXING ISSUE

Appellees, in urging that the price-fixing aspects of the case present no substantial question, point to the

[3] See the Motion at p. 7, and the citation of *United States* v. *W T. Grant Co.*, 345 U. S. 629.

[4] The exhibit shows, as appellees state, that the number of all freight-carrying cars was about 54,000 less in 1955 than in 1951. But in view of substantial year-to-year variations, it is more reliable to compare one five-year period with another than to compare two selected years. For the period 1946 through 1950 the yearly figures of all freight-carrying cars total 8,711,891, whereas for the period 1951 through 1955 the total of the yearly figures is 8,723,085. Thus, there was no contraction, and rather a slight expansion, in the later period.

testimony by their officers denying the existence of any agreement to fix prices, and assert that appellant is asking this Court to hold that, notwithstanding such testimony, the price uniformity and price leadership here shown establish illegal price fixing. Their final contention (Motion 26) is that this case is "squarely within" the holding in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 that parallel business behavior does not "conclusively establish * * *" or "itself constitute * * *" a violation of the Sherman Act.

The Government's case does not rest exclusively, or even primarily, on parallel conduct. It comprises, among other things:

(1) Continuation of precisely the same method of pricing—involving a freight equalization scheme, differently applied in two rigidly defined zones—previously employed for some 25 years pursuant to an express price-fixing agreement among the same parties;

(2) A price leader which played the same role and followed the same procedures as during the period of express price-fixing;

(3) Distribution by the price leader to competitors of its "freight differential list", which it computed on the basis of information known only to it and which was essential to effectuation of appellees' freight equalization scheme;

(4) During a period of more than 10 years, initiation of price changes solely by the price leader, and its distribution to competitors of its price changes at

or about the date of announcement and in advance of the effective date of the announced price change;

(5) Meetings at which appellees' principal officers discussed the factors affecting coupler prices and, on several occasions, urged the price leader to increase prices;

(6) A campaign by the price leader, in advance of its adoption and announcement of a material change in the basis of pricing, to convince its competitors of the wisdom of the change.

We submit, therefore, that the price-fixing issue presented by the appeal differs widely from the question considered in *Theatre Enterprises, i. e.,* whether violation of the Sherman Act was established by evidence showing that each major motion picture distributor had, on the basis of substantial business reasons applicable to all, adopted the policy of restricting the grant of first-run motion-picture licenses in Baltimore to the eight downtown Baltimore theatres, plus uncontradicted testimony that each distributor had independently adopted this policy. There, but not here, parallelism of conduct constituted the sole basis for finding combination or conspiracy.

We believe, as previously stated (J. St. 19), that the appeal presents a substantial and important issue as to whether appellees' price-fixing is governed by the principles applied in such cases as *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208; *United States* v. *Masonite Corp.,* 316 U. S. 265; and *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, or the principles found to be controlling in *Theatre Enterprises, supra.*

CONCLUSION

For the foregoing reasons, we submit that appellees' motion to affirm should be denied.

Respectfully submitted.

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